Supreme Court of the United States

October Term 1952

No. 331 MISC.

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

FREDERICK W. SCHOLEM,
HARRY G. ANDERSON,
Counsel for Petitioner.

INDEX

Petition

PAGE

Questions Certified by Court of Appeals 2

As to the Alleged Confessions 16

Undisputed Facts 41

Statutes Involved 42

Authorities Relied Upon 45

Basis of Jurisdiction 45

Reasons Relied Upon for Allowance of the Writ 46

Appendix "A" 49

Appendix "B" 64

Brief

Opinions Below 69

Statement of Jurisdiction, Questions Presented and Facts 69

Argument 70

Errors Relied Upon 87

Summary of Argument 87

Point I—

The subsequent confessions were so close in point of time and circumstance to the first, that they should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible 89

PAGE

POINT II—
Without the confessions improperly received in evidence the State has failed to make out a case 96

CONCLUSION 97

Appendix "C" 99

Appendix "D" 102

Appendix "E" 103

Appendix "F" 106

Appendix "G" 110

CASES CITED

	Page in Petition	Page in Brief
Adamson v. California, 332 U. S. 46	45	
Ashcraft v. Tennessee, 322 U. S. 154	45	87
Bram v. United States, 168 U. S. 352	45	
Brown v. Mississippi, 297 U. S. 278	45	87
Chambers v. Florida, 309 U. S. 227, 229	45	85
Couty v. Alabama, 309 U. S. 629	45	89
Gallegos v. Nebraska, 342 U. S. 55	45	92
Haley v. Ohio, 332 U. S. 596	45	76, 87
Harris v. South Carolina, 338 U. S. 68	45	
Lisenba v. California, 314 U. S. 219	45	87
Lomax v. Texas, 313 U. S. 544	45	
Lyons v. Oklahoma, 322 U. S. 596	45	80
Malinski v. New York, 324 U. S. 401	45	87

	Page in Petition	Page in Brief
McNabb v. United States, 318 U. S. 332, 342, 343	45	71
People v. Cummings, 153 App. Div. 93, affd. 209 N. Y. 283	40	
People v. Ferola, 215 N. Y. 285	40	
People v. Grossman, 184 App. Div. (3rd Dept.) 724, 728	18	
People v. Kurtz, 42 Hun (N. Y.) 335, reargument denied 42 Hun 637	18	83
People v. Sweetin, 325 Ill. 245		83
Pierre v. Louisiana, 306 U. S. 352	45	
Rochin v. California, 342 U. S. 165	45	89
Stroble v. California, 343 U. S. 181	45	91
Turner v. Pennsylvania, 338 U. S. 62	45	
United States v. Carnignan, 342 U. S. 36	45	
Vernon v. Alabama, 313 U. S. 547	45	
Ward v. Texas, 316 U. S. 547		87
Watts v. Indiana, 338 U. S. 49	45	93
White v. Texas, 310 U. S. 530	45	

Supreme Court of the United States

October Term 1952

No.

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Camilo Weston Leyra, respectfully shows the following:

The petitioner was indicted in the County Court of Kings County, for murder in the first degree. The first count of the indictment charged the petitioner with having wilfully, and feloniously, and with malice aforethought, struck and killed his mother, Catherine Leyra, on or about January 10, 1950 (fols. 17, 18).

The second count of the indictment charges that, on or about January 10, 1950, the petitioner wilfully, and feloniously, and with malice aforethought struck and killed Camilo Leyra, Sr.; the petitioner's father, with a hammer.

The first trial was had before the Honorable Samuel S. Leibowitz, County Judge of Kings County, and a jury, and the trial began on April 24, 1950. On May 14, 1950, the jury rendered a verdict of murder in the first degree under both counts of the indictment.

On June 1, 1950, the Court imposed the death sentence under both counts of the indictment. The date of the execution was fixed for July 2, 1950.

Upon the first appeal the Court of Appeals reversed the conviction and ordered a new trial (*People* v. *Leyra*, 302 N. Y. 353; see Appendix A).

The second trial began on December 10, 1951, before Judge Leibowitz and a jury. On December 21, 1951, the jury rendered a verdict of murder in the second degree, under the first count of the indictment and murder in the first degree under the second count of the indictment (fol. 144).

Upon the appeal from the second conviction, the Court of Appeals affirmed the judgment by a divided Court of four to two. The majority opinion was written by Judge Dye and was concurred in by Judges Lewis and Desmond. Judge Froessel concurred in the affirmance under the provisions of §542 of the Code of Criminal Procedure.* The dissenting opinion was written by Judge Fuld and concurred in by Chief Justice Loughran (see Appendix B).

Questions Certified by Court of Appeals

"Upon the appeal herein there were presented and necessarily passed upon questions under the

---

* Code of Criminal Procedure, Section 542. After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

Constitution of the United States: whether the defendant was deprived of due process guaranteed by the Fifth and Fourteenth Amendments thereof in the admission into evidence of the confessions of the defendant and in the admission into evidence of the testimony given by defendant at a prior trial. This court held that the rights of the defendant under the Fifth and Fourteenth Amendments of the Constitution of the United States had not been violated or denied."

At about 3:30 o'clock in the afternoon of January 10, 1950, Camilo Leyra, Sr., about seventy-five years of age, and Catherine Leyra, his wife, about eighty years of age, parents of the petitioner, were found dead in their apartment at 105 Quincy Street, Brooklyn, New York. The deceased had died about 8:30 that morning due to fractured skulls inflicted by a hammer or like instrument. There were no eye-witnesses to the crime. Your petitioner is fifty-four years of age, married and the father of three children.

The case against the petitioner rests solely upon alleged confessions claimed to have been made on the night of Friday, January 13, 1950, in the captain's room of the 88th Precinct station house, Brooklyn, N. Y. These confessions were obtained only after petitioner had been grilled by the police for four days and nights, during all of which time he had emphatically denied any connection with the crime. The petitioner had but two hours sleep during this period and when the police were unable to force a confession the petitioner was induced to sign an "*agreement*" to remain indefinitely in police custody (fol. 685; Deft's Ex. 1). The district attorney then employed Dr. Max Helfand, a psychiatrist who had studied in Vienna

and Munich and was experienced in the art of hypnosis, a form of mental coercion. It was only after being exposed to the technique of this psychiatrist that the petitioner confessed. Among other methods used by this psychiatrist was to fraudulently represent himself to be petitioner's physician called in to treat his sinus condition; to promise petitioner he would not be prosecuted for murder in the first degree if he confessed; to threaten to give petitioner an injection to make him talk; and to finally put suggestions in petitioner's mind and words in his mouth. The methods employed by Dr. Helfand are graphically described by Judge Froessel of the Court of Appeals in a unanimous opinion for reversal upon the first appeal (see *People* v. *Leyra*, 302 N. Y. 353, at pp. 359-363; Appendix A). Petitioner was illegally held in police custody for four days and was not arraigned until the morning of the fifth day. The manner in which these confessions were obtained will be discussed later in this petition.

It is significant that the police and district attorney were present on the floor below and listened to and heard the acts of coercion, suggestions, threats and promises of leniency meted out to the petitioner by Dr. Helfand as same came over the loudspeaker attached to the microphone concealed in the inquisition room. In the recording of what took place during Dr. Helfand's inquisition, the transcript records numerous instances of "whispers" and "noises" and "interruptions". Commenting on this Judge Froessel in his opinion on the first appeal, 302 N. Y. 353, at page 361, said:

> "What happened during these 'noise' periods we do not know; why the doctor suddenly asked defendant after an interruption: 'Do you feel better?'; followed by another interruption, is unexplained.

> In any event, the doctor continued with this significant question: 'These people are going to throw the book at you unless you can show that in a fit of temper you got so angry that you did it—otherwise they toos [toss] premeditation in and it's premeditation. See?' The import of this language should not be overlooked."

Upon the second trial the court charged the jury that the acts by Dr. Helfand was mental coercion as a matter of law. The court also charged the jury that Dr. Helfand, the duly authorized agent of the district attorney, had promised the petitioner that if he confessed he would not be prosecuted for murder in the first degree. The court further charged that "all other evidence in the case, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty". The court left for the jury's consideration as to whether or not the mental coercion and the promises carried over into the alleged subsequent confessions made to Captain Meenahan, Herrschaft, and Assistant District Attorneys Andreozzi and Gitlin (fols. 2671-2687).

Dr. Clarence Bellinger, renowned psychiatrist, of over forty years experience, testified that the mental coercion practiced upon the petitioner as well as the promises made to the petitioner by Dr. Helfand carried over and affected all subsequent confessions.

It is important to note that these subsequent confessions followed immediately—without a break or interruption—after Dr. Helfand had completed his unconscionable and illegal technique and were all made within a period of four hours thereafter. Petitioner contends that these alleged confessions should be considered as one document

all infected with the virus of mental coercion and contaminated with false promises of leniency.

On both trials and the two appeals to the Court of Appeals the petitioner was represented by Mr. Harry G. Anderson and Mr. Frederick Scholem, appointed by the Court, the petitioner being without funds to employ counsel.

The testimony of the People's witnesses during the second trial was practically identical with that adduced at the first trial. In reversing the conviction of the first trial, the Court in a unanimous opinion (*People* v. *Leyra*, *supra*) written by Judge Froessel stated at page 359:

> " * * * This doctor, unconnected with the police department or the prosecutor's office, had been called to the police station by the District Attorney, who outlined the case to him. The doctor had also been 'briefed' by Captain Meenahan, as is manifest from the questions he asked. He agreed to talk to defendant upon condition that there be no one else in the room; he knew, however, that the room was wired and that the interview would be electrically reported by a recording machine, which was specially set up that day. The police and the District Attorney were in the basement of the police station, where they overheard the entire interview and permitted it to continue uninterruptedly.
>
> "The doctor spent an hour or an hour and a half with defendant. A transcript of the recorded interview shows that he told defendant at the outset: 'I'll tell you what the purpose of my talk to you is. I want to see if I can help you.' To this defendant answered: 'Yes, Doctor.' The doctor asked him about his sinus condition and the treatment

he had had, and in the course of the interview said: 'I'm your doctor'. The transcript further discloses that on at least forty occasions the doctor in one way or another promised to help defendant, and on one occasion said: 'I know you are in a little trouble. We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things that we aren't really responsible for. I want to see whether or not you did something but which you've done in a fit of temper or anger. Do you understand me? A. Yes'. Defendant told the doctor he was 'very tired. I had two hours sleep. Just now they woke me up. That's since Tuesday. Well, there were questions, after questions after question by the thousands. * * * The only thing is I'm very tired. I didn't feel as tired before I went to bed as I do now. You know (interruption)'. This interruption was said to be noise, but no one knows what else defendant said here."

And at pages 360, 361:

"It happened numerous times throughout the recording. So with whispers, identified by the doctor as sounds made by defendant when he did not speak audibly. In these respects the statement is definitely incomplete. Defendant then stated that his sinus was 'bothering' him 'something terrible', and that for the past two years he had averaged over a hundred hours of work a week without vacation. After more conversation the following took place:

Q. I want you to recollect and tell me everything. I am going to make you remember and recollect back and bring back thoughts—thoughts which you think you might have forgotten. I can

make you recollect them. It's entirely to your benefit to recollect them because, you see, you're a nervous boy. You got irritable and you might have got in a fit of temper. Tell me, I am here to help you. A. I wish you could, Doctor.

Q. I am going to put my hand on your forehead and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. I am going to keep my hand on your forehead and I am going to ask you questions and now you will be able to tell me.

"This technique—of promising help, such as 'We'll help', 'Everybody will help you', 'We're with you one hundred percent', 'We'll play ball with you'; placing his hands on defendant's head; 'making' him recollect; minimizing the homicides by suggesting they were done in a fit of temper saying, 'Morally, you are not to be condemned, right? A. Right'; commanding defendant to look at him, to open and close his eyes; suggestions to defendant as to what he should say—runs all through the transcript of the recording.

"The doctor was making some progress in breaking down defendant and getting some admissions, knowing that defendant was under 'tension', 'pale', his mouth was 'dry', and despite defendant's frequent 'I can't remember', 'Doc, I'm trying so hard', 'Doctor, I'm exhausted, so please be patient.' The doctor kept at him: 'See, I can make you talk very truly. I can give you an injection now'. Near the end of the interview the following occurred:

Q. You have a much better chance to play ball (Noise) than if you say you don't remember. If you tell me that you were in a fit of anger, that you were angry, that you just swung the hammer but if you tell me that you don't remember, then you will be working against yourself. Where will it get you? A. At that point there, I was so mad. I was like white hot metal. I was so mad. I was never mad at anyone in my life * * * (Noise) * * *. Q. Do you feel better? * * * (Noise) * * * Do you want coffee? A. I drank coffee all night long * * * (Noise) * * * (asterisks *sic*).

"What happened during these 'Noise' periods, we do not know; why the doctor suddenly asked defendant after an interruption, 'Do you feel better?', followed by another interruption, is unexplained. In any event, the doctor continued with this significant question: 'Q. These people are going to throw the book at you unless you can show that in a fit of temper you got so angry that you did it. Otherwise they toss premeditation in and it's premeditation. See?' The import of this language should not be overlooked.

"After some more coffee, defendant asked to speak to Captain Meenahan, whereupon he made a full and detailed confession to both homicides, in the course of which he stated he lost his temper and was overcome by a fit of anger and rage. Following his confession to Captain Meenahan, he told his partner, Herrschaft, who had been directed by a detective to be present, that he 'did it'. Thereafter and during the same evening, defendant again confessed these crimes to two assistant district attor-

neys, who took the written statement from him offered in evidence. He was fingerprinted that night and arraigned the next morning.'"*

And at page 362:

"We are thus squarely confronted with the question as to whether or not the admissions in defendant's statement to the doctor were properly received and submitted to the jury, as evidence from which they might determine his guilt. We think not, and, under the circumstances here disclosed, the trial court should have so determined as a matter of law; it is the duty of the court to reject a confession if a verdict that it was freely made would be against the weight of the evidence. People v. Doran, 246 N. Y. 409, 159 N. E. 379; People v. Valletutti, 297 N. Y. 226, 78 N. E. 2d 485. Bearing in mind the undisputed setting in which this interview was arranged and recorded, while defendant was in custody of the police; defendant's physical and mental condition at the time, already alluded to; the psychiatrist, calling himself defendant's doctor, playing upon the latter's natural fears and hopes, pressing his hands upon defendant's head with accompanying commands, and suggesting details to an unwilling mind by persistent and unceasing questioning; informing defendant that he was not morally responsible; making deceptive offers of friendship and numerous promises, express and

* Footnote ours. The questioning of petitioner began on Tuesday afternoon and continued until 11:00 P.M. Friday night. Petitioner was not arraigned until Saturday morning, four days after the interrogation began. Captain Meenahan "persuaded" the petitioner to sign an "agreement" to remain in custody of police indefinitely (fol. 685, Deft's Ex. 1).

implied; giving assurances in a pseudo-confidential atmosphere of physician and patient; and all the attendant circumstances taken together—this interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here. No such intrusion may be sanctioned in a system of law which is based upon the presumption of innocence, surrounded by the constitutional safeguards afforded to every individual. The doctor here did not tell defendant that he had been called into the case by the District Attorney; that the latter and the police were listening to their conversation; that defendant could have his own doctor or lawyer or any one else present; he conspicuously omitted to tell defendant that he was under no duty to speak or that anything he might say could be used against him. See People v. Fernandez, 301 N. Y. 302, 333, 93 N. E. 2d 859; People v. Esposito, 287 N. Y. 389, 398, 39 N. E. 2d 925, 928, 142 A. L. R. 956.

" * * * this Court is unwilling to assent to the doctrine that representatives of the State may thus employ a relationship they established between the doctor and this defendant, which is of a character that our public policy holds privileged, Civil Practice Act, §352, in order to obtain a confession out of defendant's own mouth without warning and under the circumstances here disclosed. People v. Fernandez, supra; People v. Esposito, supra; People v. Furlong, 187 N. Y. 198, 212, 79 N. E. 978, 983. If a physician may be thus used, then why not a lawyer or a clergyman? The essential fairness which is supposed to form the warp and woof of

our fabric of justice would certainly be wanting if practices such as these were to be approved. See People v. Levan, 295 N. Y. 26, 64 N. E. 2d 341."

And at page 364:

"We have held that an involuntary confession is by its very nature evidence of nothing. People v. Valletutti, supra, 297 N. Y. at page 231, 78 N. E. 2d, at page 487. Moreover, our Federal Constitution, 14th Amendt., is a bar to the conviction of any individual in our courts of justice by means of a coerced confession. Ashcraft v. State of Tennessee, supra. We have a like provision in section 6 of article I of our State Constitution. A denial of due process has been defined as the failure to 'observe that fundamental fairness essential to the very concept of justice. * * * Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilty'. Lisenba v. People of State of California, 314 U. S. 219, 236-237, 62 S. Ct. 280, 290, 86 L. Ed. 166. Not only is the use of a coerced confession in obtaining a conviction a violation of due process, but, if such confession is admitted in evidence, that is sufficient to void the conviction regardless of other evidence which might nevertheless demonstrate guilt. Malinski v. People of State of New York, 324 U. S. 401, 65 S. Ct. 781, 89 L. Ed. 1029, see, Note, 93 L. Ed. 115; Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; Turner v. Commonwealth of Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810; Harris v. State of South Carolina, 338 U. S. 68, 69 S. Ct. 1354, 93 L. Ed. 1815; Haley v. State of Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224; Ashcraft v. State of Tennessee,

supra; Chambers v. State of Florida, 309 U. S. 277, 60 S. Ct. 472, 84 L. Ed. 716.

"We recognize that due process is not lacking where upon facts permitting different conclusions it is left for the jury, under a proper submission, to say whether or not there was coercion, Malinski v. People of State of New York, supra; Lisenba v. People of State of California, supra; Lyons v. State of Oklahoma, 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481, but here the method employed is not controverted and the statement itself is beyond dispute, for it is recorded. The transcript of the recording clearly discloses that the interview took place in an atmosphere of the utmost pressure, and in a manner and with a skill possible only to an experienced psychiatrist, unfamiliar with an accused's fundamental rights. As the prosecutor said of this psychiatrist in his summation; 'with his superior mental powers, his studies of psychology, he was able to accomplish what a brow-beating policeman might not have been able to obtain.' This was an eloquent tribute to the efficacy of mental coercion over physical.

"Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. A confession by which a person forfeits his life must be grounded on reasoned and voluntary choice. We would have to close our minds to the plain import of what occurred to deny that here was a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances

> and at the same time conducting an unrelenting interrogation of the exhausted accused. Aside from constitutional objections, we have not yet reached the stage where medical science, represented by an accord among its experts, establishes the trustworthiness of a confession induced by the means here adopted. See 3 Wigmore on Evidence (3d ed.), §841a; People v. Forte, 279 N. Y. 204, 206, 18 N. E. 2d 31, 32, 119 A. L. R. 1198. Due process of law guaranteed by our State and Federal Constitutions commands that no such practice as revealed by this record shall send an accused to his doom, regardless of the brutality of the crimes with which he is charged."

The second trial was had before Judge Samuel S. Leibowitz, who also presided over the first trial, and a jury. The jury rendered a verdict of murder in the first degree under the first count and murder in the second degree under the second count of the indictment. The trial court imposed a sentence of death upon the conviction under the first count of the indictment, and a sentence of from seventy-five years to life imprisonment under the second count of the indictment.

Upon the second appeal the Court of Appeals affirmed both judgments of conviction. The decision was rendered by a divided count of four to two. The prevailing opinion was written by Judge Dye and was concurred in by Judges Lewis and Desmond. Judge Froessel concurred for affirmance under Section 542* of the Code of Criminal Procedure.

---

* Code of Criminal Procedure, Section 542:

> "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

Judge Fuld dissented in an opinion in which Chief Judge Loughran concurred (see Appendix B).

Judge Fuld in his dissenting opinion wrote:

> "To see this case whole and in proper focus, it must be borne in mind that defendant's conviction rests solely upon his confessions and that the trial court so charged the jury, advising that, absent those confessions, 'defendant must be acquitted for the reason that the Court rules, as a matter of law, that all other evidence in the case * * * even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty' " (see trial court's charge, fol. 2687).
>
> "The trial judge charged unequivocally that Dr. Helfand had promised defendant, 'in order to induce him to confess,' that he would not be prosecuted for murder in the first degree, that such promise was authorized by the District Attorney and that defendant confessed in reliance upon it. Consequently, as the trial court went on to charge, that confession was inadmissible as a matter of law. (See Code Crim. Pro., Sec. 395.) In view of that charge—which, of course, became the law of the case—it necessarily follows, as a matter of ineluctable logic, that any and all other confessions to the District Attorney or those associated with him in the investigation and prosecution of this very homicide, must also be deemed to have been induced by that promise, and likewise inadmissible. Accordingly, when the court further instructed the jury that it might find that the confessions to assistants of the District Attorney and to a police captain—made within an hour or two after immunity had

been promised—had not been induced by the promise, it pursued a course that was not only opposed to logic, but incompatible with the law of the case. That was error highly prejudicial to the defendant."

As to the Alleged Confessions

The case against the petitioner rests wholly upon alleged confessions and the trial court so instructed the jury (fols. 2671-2687). These alleged confessions were made on January 13, 1950, at the 88th Precinct station house in Brooklyn. Prior thereto, the petitioner was in the custody of the police; and, prior to the taking of the alleged confessions, the police had obtained a written consent from the petitioner to remain indefinitely in the custody of the police (fol. 685, Deft's Ex. 1). This illegal "consent", undoubtedly, was obtained by Police Captain Meenahan in order to excuse his failure to arraign the petitioner before a magistrate, as required under the provisions of the Code of Criminal Procedure (N. Y. Penal Law, §§1841, 1844).

At folio 2694 the trial court instructed the jury that the delay in arraigning the petitioner before a magistrate was illegal. The trial court, however, did not instruct the jury that the failure to arraign the petitioner as required by statute constituted a crime under the provisions of §1841 of the Penal Law (see *People* v. *Mummiani*, 258 N. Y. 395).

The efforts of Captain Meenahan to obtain a satisfactory confession having been unsuccessful, the district attorney personally employed Dr. Helfand, a psychiatrist, to further interrogate the petitioner. Dr. Helfand accepted the employment upon the condition that no one else be present during the interrogation of the petitioner.

Prior to this Dr. Helfand had been "briefed" by Captain Meenahan as to the nature of the case and the latter told Dr. Helfand what had previously been told him by the petitioner.

Dr. Helfand's interrogation of the petitioner took place on January 13, 1950, in a room on the upper floor of a station house. In accordance with the conditions exacted by Dr. Helfand, no one else was present in the room where the petitioner was questioned. A tape recorder and a loud speaker had been installed in a room on a lower floor of the station house by means of which those present could listen in upon the interrogation. Listening in were the district attorney in person, Acting Captain Meenahan and other detectives (fols. 674-675).

At the outset of the consideration of the alleged confessions made to Dr. Helfand, it is important for the Court to note that he concealed from the petitioner the fact that he was the district attorney's representative or that he was in any way associated with the prosecuting authorities but instead fraudulently represented himself to be petitioner's doctor. Furthermore, it is conceded that no warning was given by Dr. Helfand to the petitioner that he was at liberty to refuse to answer any questions or that any incriminating statements would be used against him.

The district attorney, as already stated, had listened to what was taking place between Dr. Helfand and the petitioner. The district attorney was not called as a witness and he in no way indicated disapproval of the methods employed by Dr. Helfand. Nor did he disavow any of the promises made by the doctor to the petitioner. There is no dispute that Dr. Helfand was employed by the district attorney who must be held to have approved the methods

employed by Dr. Helfand (*People* v. *Grossman*, 184 App. Div. [3rd Dept.] 724, 728; *People* v. *Kurtz*, 42 Hun [3rd Dept.] 335 and cases cited; reargument denied 42 Hun 637).

Upon the second trial Dr. Helfand was called as a witness by the district attorney (fol. 749) and gave testimony regarding his qualifications as a physician (fols. 754-758).

The attorney for the petitioner stated that he wished to examine Dr. Helfand on the *voir dire* (fols. 761-768). Among other things, Dr. Helfand testified at folio 777:

> Q. Now, in telling us about your qualifications, Doctor, did I understand you to testify that you studied in the University of Vienna? A. Yes, sir.

And at folios 1571-1573:

> Q. Were you asked this question in the last trial:
>
> "Q. How many experiments by medical men, psychiatrists, have you seen performed?" and did you give this answer: "A. Well, I witnessed experiments when I was in the University of Vienna conducted by Professor Schulderkauder. I also witnessed experiments conducted by Professor McDougall at Duke University. I have also witnessed experiments conducted in the University of Cardiff by Professor Graham Brown". Was that question asked of you and did you give that answer? A. Yes, sir.
>
> Q. * * * Were you asked this question: "Q. And would you say you have seen a number of experiments by medical men, not by vaudevillians performed in hypnosis, yes or no?" "A. Yes, I did". And then the next question was the one that I have previously asked? A. Yes.

> Q. So what is your testimony today, that you witnessed these experiments or you didn't witness these experiments at Duke University by Professor McDougall? A. Yes, I witnessed some scientific experiments pertaining to hypnosis but in animal hypnosis.

Dr. Helfand was examined by the district attorney and attested to the fact that he was summoned to the station house by the district attorney on January 13, 1950, at which time Dr. Helfand employed his illegal and unconscionable methods to obtain a confession (fols. 768-771).

The petitioner had already been questioned by the police for four days without arraignment with only two hours sleep. Petitioner said to Dr. Helfand, the authorized agent of the district attorney (fols. 780, 781):

> "* * * *I am very tired. I had two hours' sleep. Just now they woke me up. That is since Tuesday. Well, there are questions after questions by the thousands."* (Emphasis ours.)

The technique used by this psychiatrist to mentally coerce the petitioner may be summarized as follows:

> First: To fraudulently represent himself to be petitioner's doctor called to treat his sinus condition (fol. 802).
>
> Second: To promise petitioner he would not be prosecuted for murder in the first degree if he confessed (fols. 796-798).
>
> Third: To threaten to give petitioner an injection to make him talk (fol. 811).
>
> Fourth: To put suggestions and ideas in petitioner's mind and actual words in petitioner's mouth (fol. 843).

The following excerpts from the record are illustrative of the mental coercion practiced on the petitioner:

At folios 779, 780:

> " * * * 'Buddy, will you tell me something about yourself? I will tell you what the purpose of my talk to you is. I want to see if I can help you.' "
>
> " * * * 'I know you are in a little trouble. We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things that we are not responsible for. I want to see whether or not you did something but which you have done in a fit of temper or anger.' "

And at folios 792-801:

> " * * * 'I want you to recollect and tell me everything. *I am going to make you remember and recollect back and bring back thoughts,* thoughts which you think you might have forgotten. *I can make you recollect them.* It is entirely to your benefit to recollect them because, you see, you're a nervous boy. You got irritable and you might have got in a fit of temper. Tell me, I am here to help you.' "
>
> " * * * *'I am going to put my hand on your forehead and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. I am going to keep my hand on your forehead and I am going to ask you questions and now you will be able to tell me.'* "
>
> " * * * *'I've got my hand on your forehead and I am making you tell me the truth. It's all for your benefit if you tell me everything. I am here to help you.'* "

" * * * 'I know you are trying hard but *I'm trying to help you.* I'm making your thoughts come back to you.' "

" * * * 'It's coming clear now. You will feel lots better after you tell me. It's all in a fit of argument. Speak up. Speak up. It's coming clear to you. *I have my* hand on your forehead.' "

" * * * 'It's coming all clear to you now. *I've got my hand on you. I'll make you think back.* All your thoughts are coming back to you.' "

" * * * 'Go ahead. Come on. Tell me what happened then. Come on, now. Speak up. You're going to feel lots better. *We're with you 100%.* Come on. Come on. *We'll help you.*

" * * * 'That's right, go ahead. Come on. You're going to feel lots better. *We're with you 100%.*

" * * * 'Sure, you can. Look at me. Open your eyes. Now you know what happened. Look at me. I know you know what happened.' And did the defendant answer: *'I can't think?'* A. That's right."

" * * * 'Come on now. Don't be afraid. Your conscience will be clear. *God will be with you, and everybody will help you if you tell the truth.* Everybody will help you, but nobody likes a liar, not even God. Come on, now. Tell the truth'. And did the defendant then answer: *'I can't think'?* A. That's right."

"Q. And then did you say to the defendant: 'Your father went for the paper; then you hit your mother, didn't you? With what did you, with a hammer? Your thoughts are coming back to you. What did

you use to hit your mother with?' And did the defendant answer to you: *'I loved my mother.'* A. That's right."

"Q. And then did you say right after that: 'Yes, I know you did. *You lost your temper.* Don't be afraid. *A lot of people do things that they are not responsible for while in a fit of temper.* You see?' And did the defendant make this answer: *'My mother was the only thing in the world'?* A. That's right."

"Q. Now, a little further down, Doctor, did you say to the defendant: 'Come on, yes, you can. Speak up. So you thought it would be the right thing to do what? Come on, you started now. Speak up. *Everybody will help you. You're a nice fellow.* You're a man now. You don't want to be a coward. *Everybody will help you. You were excited. You did it in a fit of anger.'* Did you say that to the defendant? A. Yes, I did."

"Q. And then further down, did you say: 'Look at me. Look at me.' And did he answer: 'Yes, Doc.'? A. Yes."

"* * * 'Your thoughts are coming into you; don't be afraid, Buddy. We're all with you 100%. We'll help you. We'll help you every way possible. *I'm your doctor. I'm going to help you.'* "

And at folio 806:

"* * * *'I am your doctor.'* "

And at folio 808-813:

"* * * *'If you will be honest with me, I will help you. Everybody thinks a lot of you. You're a nice man.'* "

" * * * 'That is because you are nervous, you see. Your conscience is bothering you. After you tell me and tell me the truth, then you will feel relieved. *We're all with you 100%.* Then you will be fine. *Now, let me put my hand on your forehead again',* and did the defendant say, *'It hurts so'?* A. Yes, sir."

" * * * 'Now, you listen to me. Listen to me and concentrate.' "

" * * * 'Sure, you can think. Only cowards can't think. You are not a coward. You can speak up. You know. You know. What you did. Come on now. Come on. *I have my hand on your forehead and your thoughts are coming back to you,'* and did he answer you, 'No, Doc, they don't'. A. Yes, sir."

" * * * 'You know you hit your mother first, you know you hit your mother on the head. Speak up. What did you do?' A. 'I don't know, Doctor'. A. That's right. Q. Then, did you say: 'Yes, you do. Speak up now. Speak up. See, I can make you talk very truly. *I can give you an injection now.* It's much better if you tell it to me this way. Come on, now, speak up'. and the answer, 'I can't think, Doctor'. Did he say that to you? A. Yes, sir."

And at folios 814-846:

" * * * *'I'm trying to help you* if you tell me the truth. *I am on your side. I am going to help you all I can.* Come on, now, Buddy. *Be a nice fellow. Put your hand here.'* "

" * * * 'Don't be afraid. *We're all with you. We want to help you.'* "

" * * * 'Just relax now and everything will come back to you. You know what happened. Everybody—I mean, these people know what happened. It's much better for you to come clean and play ball. Everybody thinks you are trying to hide something.' "

"Q. A little further on, did you say: 'I know you're trying. I'm trying with you because you're a nice fellow.' And did he answer, 'I just can't think'? A. Yes, sir."

" * * * 'Now, you think. All your thoughts will come back to you. Just think. Just relax. All your thoughts will come back to you. I have my hand on your head. Your thoughts are coming back to you. It's much better for you. You will get along much better and you will feel better.' "

" * * * 'You may as well tell us and we'll work with you. *We'll play ball with you. We'll help you if we can. It will make you feel better.* Come on now, speak up.' "

" * * * 'Sure you can. Open your eyes. Don't say you can't. Just look at me.' And did the defendant give you this answer: 'I just don't remember.' * * * Q. And did you say then: 'Sure you can.' And did he say: 'No. I can't think, Doctor.' A. That's right."

" * * * *'Buddy, it doesn't help you if you say you can't think when you know you did it, so you may as well tell us and get our help. If you don't tell us and get our help, I'll wash my hands of you.* All right, close your eyes and think hard. Just close your eyes now and your thoughts will come back

to you. All your thoughts are coming back to you. You're a nice fellow and you're excited; and in a fit of temper you said you were going to kill him when he comes back.' "

" * * * *'We are working with you.'* * * *'We are working with you. You are nervous. Just let me put my hand on your head and your thoughts will come in.'* "

" * * * *'I will help you, Buddy.'* "

" * * * 'I'll help you Buddy, *I am with you one hundred per cent, but you got to play ball with me.'* "

" * * * 'I'll help you. I've got my hand on your forehead and your thoughts are coming back to you'. Did you say that a little further down?"

" * * * 'You don't remember because you can't remember because if you were a bum or a robber or a burglar, I am making thoughts come back and *I am going to help you* and you are going to feel lots better.' "

" * * * 'Just concentrate. Now, listen to me, just concentrate.' * * * 'Just concentrate, and your thoughts will come back; just concentrate; just concentrate. Relax.' "

" * * * 'I want you to recollect your thoughts; tell me all the details. *I can make you talk.'* "

" * * * *'I am going to make you remember.'* "

" * * * *'We will make them come back to you.'* "

" * * * *'I am making your thoughts clear.'* "

" * * * 'All right, relax and think. *You stay here until your thoughts come back to you.'* "

" * * * 'Then did you say to the defendant a little further down: "Think and tell me." and did he say to you "She was just like a baby to me." A. Yes, he said that.' "

" * * * 'Just relax and your thoughts will come back to you because I have my hand on your forehead. Everything will be fine.' "

" * * * 'I am helping you to think; if you want to you can. There is only a question of wanting.' "

" * * * 'We know you are a nice man and I am trying to help you.' "

" * * * 'Take your time and relax. *Now open your eyes and look at me, just open your eyes—look at me,* your thoughts will come back; look at me and concentrate.' "

" * * * 'Everybody is with you 100%.' "

" * * * 'Just concentrate and your memory will come back to you.' "

" * * * 'I have got my hand on your forehead. Your thoughts will come back to you. Everything will be clear.' "

" * * * 'We are trying to help you. We are trying to help you. Your thoughts are coming in to you.' "

" * * * *I am going to make you remember.*"

" * * * *We will make them come back to you.*"

" * * * *I am making your thoughts clear.*"

" * * * All right, relax and think. *You stay here until your thoughts come back to you.*"

" * * * Then did you say to the defendant a little further down: Doctor 'Think and tell me.' And did he say to you: 'She was just like a baby to me.' A. Yes, he said that."

" * * * Just relax and your thoughts will come back to you because I have my hand on your forehead. Everything will be fine."

" * * * I am helping you to think; if you want to you can. There is only a question of wanting."

" * * * We know that you are a nice man and I am trying to help you."

" * * * Take your time and relax. Now open your eyes and look at me, just open your eyes—Look at me, your thoughts will come back; look at me and concentrate."

" * * * *Everybody is with you 100%.*"

" * * * Just concentrate and your memory will come back to you."

" * * * I have got my hand on your forehead. Your thoughts will come back to you. Everything will be clear."

" * * * We are trying to help you. We are trying to help you. Your thoughts are coming in to you."

" * * * Just close your eyes and it will all come back to you. Just close your eyes and relax."

" * * * Close your eyes and your thoughts will come back. Relax."

" * * * *I am going to make your mind recollect everything.* Your mind is getting clearer and

clearer; all your thoughts are coming back now. Now they're coming back."

" * * * Your mind is clear now. Speak up. Speak up. Now your mind is clear. Now speak up."

" * * * I can't remember anything about it at that point."

" * * * *If you tell us the details and come across like a good man, then we can help you.* We know that morally you were just in anger. *Morally, you are not to be condemned.* Right."

" * * * But you have to tell us the details, then we will know that you are above board and on the level. Otherwise, we just don't do nothing to you and you will get the worst of it."

" * * * You are a nice fellow. *I am willing to stay here with you and help you* but you have got to help yourself."

" * * * If you will just stop for a minute, you will remember, and your thoughts will come into you. And did he give you this answer: *'Doctor, I am exhausted, so please be patient.'* A. Yes, sir."

" * * * *You have got a much better chance to play ball"* * * *"Than if you say you don't remember. If you tell me that you were in a fit of anger, that you were angry, that you just swung the hammer, but if you tell me that you don't remember, then you will be working against yourself. Where will it get you?"*

" * * * *These people are going to throw the book at you unless you can show that in a fit of temper you got so angry that you did it. Otherwise they toss premeditation in and it's premeditation."*

"* * * Well, we are getting along very nicely. I am trying to straighten him out with his troubles."

"* * * *His mind is clear now. I made him concentrate. His mind is much clearer. You can take my seat, Captain.*"

There was thus presented to the jury an account of the methods employed by Dr. Helfand in obtaining the confession, methods which the Court of Appeals on the first appeal held to be mental coercion, unlawful and a violation of petitioner's constitutional rights. Judge Froessel pertinently wrote in his opinion in *People* v. *Leyra*, 302 N. Y. 353, at page 364:

"We recognize that due process is not lacking where upon facts *permitting different conclusions* it is left for the jury, under a proper submission, to say whether or not there was coercion, Malinski v. People of State of New York, supra; Lisenba v. People of State of California, supra; Lyons v. State of Oklahoma, 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481, but here the method employed is not controverted and the statement itself is beyond dispute, for it is recorded. The transcript of the record clearly discloses that the interview took place in an atmosphere of the utmost pressure, and in a manner and with a skill possible only to an experienced psychiatrist, unfamiliar with an accused's fundamental rights. As the prosecutor said of this psychiatrist in his summation: 'with his superior mental powers, his studies of psychology, he was able to accomplish what a brow-beating policeman might not have been able to obtain.' This was an eloquent tribute to the efficacy of mental coercion.

> "Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. A confession by which a person forfeits his life must be grounded on reasoned and voluntary choice. We would have to close our minds to the plain import of what occurred to deny that here was a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation of the exhausted accused. Aside from constitutional objections, we have not yet reached the stage where medical science, represented by an accord among its experts, establishes the trustworthiness of a confession induced by the means here adopted. See 3 Wigmore on Evidence [3d ed.], §841a; People v. Forte, 279 N. Y. 204, 206, 18 N. E. 2d 31, 32, 119 A. L. R. 1198. Due process of law guaranteed by our State and Federal Constitutions commands that no such practice as revealed by this record shall send an accused to his doom, regardless of the brutality of the crimes with which he is charged."

This technique was illegal and unconscionable. The disclosure of this interview by the psychiatrist violated Section 352 of the New York Civil Practice Act, being a privileged communication under these special circumstances and was so held by the Court of Appeals of the State of New York in its unanimous opinion reversing the first conviction (*People* v. *Leyra*, 302 N. Y. 353, 363; Appendix A). It might be significant to point out that this psychiatrist submitted a bill for $2,175. and actually received from the

Comptroller of the City of New York the sum of $1,600. for his unique services (fols. 1578, 1580).

This alleged confession to the psychiatrist, although barred by the Court of Appeals in reversing the first conviction in *People* v. *Leyra* (see Appendix A), was admitted in evidence over petitioner's objection (fol. 1674). All of the alleged confessions relied upon by the People to sustain the conviction were obtained during a period of four hours on the same night and only after exposure to Dr. Max Helfand, the psychiatrist, and continuous grilling by the police for several days without arraignment.

Dr. Helfand, after having successfully completed the technique of mental coercion on the petitioner, then transferred the coerced and suggestible petitioner to Captain of Detectives Meenahan by saying: "You can take my seat, Captain" (fol. 846). The mental coercion continued over to the captain who was acting as the surrogate or substitute of the psychiatrist (fol. 873). Captain Meenahan then stated to petitioner: *"He is a doctor. That is what you were promised. Anything you want—any help you want"* (fol. 2016).

Immediately upon Captain Meenahan's leaving the room, he sent in Herrschaft, petitioner's partner and a witness for the People, who remained just a few minutes but testified to a cryptic admission by the petitioner. It is significant that there is no wire recording of this admission, yet all other interviews and admissions were recorded and said interview was in the same wired room. It is also significant that Herrschaft denied, under oath, a written partnership agreement with petitioner, yet when same was produced by petitioner's counsel, admitted his signature affixed thereto (fols. 1057-1062; Deft's Ex. 2). Immediately after the claimed admission to petitioner's partner, this illegal in-

quisition was continued by two assistant district attorneys who did not disclose that either was an assistant district attorney, nor did either inform petitioner that he was under no duty to talk to them.

Dr. Clarence H. Bellinger, who had been appointed by the trial court, a diplomate of the American Board in both neurology and psychiatry, a physician with outstanding qualifications, who had been practicing for over forty years (fols. 867, 860), testified that the mental coercion practiced upon petitioner, as well as the promises made to petitioner, carried over into all subsequent confessions (fol. 2018):

> "Q. * * * Now, assuming further, Doctor, that the technique used by Dr. Helfand was mental coercion, can you say in your opinion and with reasonable certainty whether or not the mental coercion practiced upon the defendant by Dr. Helfand continued over into the statements made by the defendant to Captain Meenahan? A. In my opinion, it carried over from one to the other.
>
> "Q. Now, Doctor, assuming all the facts given to you in my first hypothetical question; and assuming, further, Doctor, that as soon as Captain Meenahan finished with the defendant, the Captain called in Herrschaft, the defendant's partner, who in turn took a seat in the Captain's room, and the Captain left the room and closed the door; and assuming, further, Doctor, that the defendant made certain statements to his partner Herrschaft, can you say in your opinion and with reasonable certainty whether the mental coercion practiced upon this defendant by the psychiatrist and neurologist continued over into the statements made, if any, by the defendant to the defendant's partner Herrschaft? A. In my opinion it carried over."

And at folio 2025:

> "Q. * * * Can you say in your opinion and with reasonable certainty whether or not the mental coercion practiced upon this defendant by said psychiatrist and neurologist continued over into the last statement given to the Assistant District Attorney? Can you, Doctor? A. I can.
>
> "Q. What is your opinion, Doctor. Did that mental coercion continue over? A. In my opinion, it did."

Dr. Bellinger's testimony was not in the slightest affected by the relentless cross-examination of the district attorney or by the cross-examination by the Court.

The Court in cross-examining Dr. Bellinger adduced the following at folios 2059-2060:

> "* * * Assume that his conversation with Dr. Helfand stopped at a certain point, that none of the details of the alleged assault upon the mother, and certainly none of the details of the alleged assault upon the father; and certainly none of the details at all as to what transpired after the accident were discussed between Dr. Helfand and this defendant, do you say that what he said later to Captain Meenahan about these matters was the result of suggestion?
>
> "The Witness: Yes, sir.
>
> "Q. From prompting? A. Yes, sir, I think they were.
>
> "Q. By Dr. Helfand? A. In my opinion—
>
> "Q. What? A. It is my opinion, it was the result of that coercion.
>
> "Q. I am not speaking of coercion. I am speaking of suggestion and promptings. A. Yes.

"Q. Were they the result of the promptings by Dr. Helfand? A. I think they were, yes."

Dr. John M. Murphy called by the People had been practicing psychiatry for less than ten years (fol. 888). He admitted that he did not know the meaning of a capital case, nor did he ever testify in one (fol. 894). Dr. Murphy never saw the petitioner before the trial, nor did he ever examine the petitioner, nor did he ever hear the petitioner's voice, since petitioner did not testify during the second trial. Dr. Murphy's testimony was completely destroyed during cross-examination when he was compelled to admit that the mental coercion carried over (fols. 906, 907).

Dr. Murphy testified for the People as follows (fols. 886-890):

"Q. You were in the court room on Thursday when Dr. Helfand testified, were you not, sir? A. Yes.

"Q. Did you listen intently to his testimony? A. Yes, I did.

"Q. Now, you heard the questions that were put by Dr. Helfand to this defendant and the defendant's answers, as they were related in the course of the examination by Dr. Helfand, by Mr. Scholem? A. Yes.

"Q. Now, Doctor, assuming that the actions of Dr. Helfand constituted mental coercion, can you say with reasonable certainty, doctor, whether or not that mental coercion would carry over into any subsequent interviews or statements made by the defendant to anybody else? A. I do not feel it would.

"*By the Court*:

"Q. The question is: Can you state with reason-

able certainty whether it would? Just answer yes or no. A. No.

"Q. Can you state whether it would or would not? A. I would state—

"Q. Don't tell us what your conclusion is. We will get to that later. There is a certain formality that you have to go through in putting these questions to experts. The first question that must be put to an expert is what you are being asked now: Can you state with reasonable certainty whether or not the mental coercion carried over into subsequent statements made by the defendant, if made? A. No.

"Q. Can you state—can you give your opinion? A. Oh, yes, I can state—I can give an opinion.

"Q. With reasonable certainty? A. Yes.

"The Court: Now.

"*By Mr. Cone*:

"Q. What is your opinion, doctor? A. My opinion is that it would not carry over."

On cross-examination Dr. Murphy went so far as to say that it was his opinion that mental coercion had not been exerted by Dr. Helfand. Upon recross-examination Dr. Murphy testified as follows (fols. 906-907):

"*By Mr. Scholem*:

"Q. Now, Doctor, did you hear Dr. Bellinger testify in court? A. I did.

"Q. You worked with Dr. Bellinger? A. I worked for him, yes.

"Q. You worked with him in Kings State Hospital? A. There is no Kings State Hospital.

"Q. Brooklyn State Hospital, is that correct? A. Yes.

"Q. You have the highest regard for Dr. Bellinger as a psychiatrist and neurologist, do you not? A. Yes, I do.

"Q. Now, Doctor, isn't it a fact that after mental coercion is practiced upon an individual, and someone in authority then takes the place or the seat of the previous examiner, of the psychiatrist that coerced the defendant, isn't it a fact that the person that takes that seat of the psychiatrist assumes the same position that the psychiatrist had and the mental thoughts of the defendant are carried over from the psychiatrist to the captain or the surrogate, as Dr. Bellinger expressed himself—the captain who took the exact same seat of the psychiatrist. Isn't that so, Doctor? A. That is right.

"*By the Court*:

"Q. Did you understand the question? A. If he is so directed; yes. He asked me to assume—

"Q. Speak up so I can hear you. A. He asked me if the authority of the psychiatrist could carry over to the captain or anybody else in his place.

"Q. That is not what he asked you.

"The Court (to the stenographer): Read the question (question was read).

"*By the Court*:

"Q. Do you understand the question? A. Yes, I think I do, your Honor.

"Q. Let us see if you understand. What is the question? A. I will give you my answer if you want.

"Q. I want first—I want to know if you understood the question, because it is a long question? A.

Yes; he asked me if I assumed that mental coercion was existing here and could it carry over from the psychiatrist, the mental thoughts of the psychiatrist would carry over to the captain so that the effect of the psychiatrist on the patient will be endowed upon the person who succeeded him—assuming, as he said, the fact that the man was mentally coerced. My answer to that, the power could be transferred over to the succeeding person if the psychiatrist so directed the patient to recognize the succeeding person as his substitute."

Upon redirect examination by the district attorney Dr. Murphy further testified (fols. 910-915):

"Q. In the testimony you have heard yesterday, when Dr. Helfand was examined on the stand did you hear any such direction? A. When it was brought out by Dr. Bellinger that the doctor said to 'take my chair' to the captain. That was the only direction. It was not a direction to the patient in my opinion. If there is any mental coercion, the doctor would have to express himself directly and talk directly to the patient to make the patient feel the compulsion of recognizing the captain as his successor.

"Q. Merely talking about taking over the chair, would that in and of itself have been enough to carry over a mental coercion if there were any? A. I do not feel it would; no.

"Q. Doctor, isn't it a fact that if mental coercion were practiced by Dr. Helfand, that he would have to remain there with the subject while any subsequent person exercised it, in order to maintain the mental coercion if any? A. Again I will have to

give you an answer that is a little bit more than a yes or no answer. It would depend entirely upon what directions the psychiatrist gave to the patient. If the psychiatrist said to the patient that any sort of mentally compulsive state that he was in should continue to the succeeding man, to talk freely to the succeeding man without his presence, then it could very well carry over without the psychiatrist's presence. If the report and contact between the psychiatrist and the patient was so strong that it was the psychiatrist's own personality, any mentally coercive powers that induced the patient to talk to the succeeding person, I would feel that the psychiatrist would have to be present in order to maintain the patient in the state of mental coercion.

"Q. In this case here, bearing in mind the testimony of Dr. Helfand on the stand concerning his actions with this defendant Leyra, then in your opinion, if there were any mental coercion practiced therein, it would not carry over, is that right, sir? A. That is right.

"Q. That was based on the facts you have already heard? A. From what I heard in court Thursday."

It is most significant that the district attorney deliberately failed to ask its own expert, Dr. Max Helfand, the psychiatrist who interrogated the petitioner and who observed his pallor, dryness of mouth, tension and exhausted condition, at the time of the mental coercion and promises were made, whether or not the mental coercion or promises or both carried over into the subsequent alleged confessions. This physician was in a superior position to verse an opinion on the subject.

In the final analysis the People's case rests entirely upon Dr. Murphy's wavering and unreliable opinion, which is referred to at page 27 of this petition. Dr. Murphy was obviously not in a position to take into consideration everything that took place when Dr. Helfand was questioning the petitioner at the police station two years previously. The recording device installed in the police station showed numerous "noises and whispers" proceeding from the room where Dr. Helfand was alone engaged in his unlawful methods to obtain a confession from petitioner. These methods were fully described by Judge Froessel in his opinion upon the first appeal (*People* v. *Leyra*, 302 N. Y. 353, 360, 361). This unscrupulous psychiatrist during these periods of "whispers and noises" might have given directions and commands to the petitioner and said and did things which he did not want recorded.

Dr. Murphy had never examined the petitioner and had never seen him before the trial. His entire opinion is based upon observing the petitioner during the trial which took place over two years after the mental coercion occurred. In the final analysis the State of New York demands that the life of petitioner be forfeit solely upon the weak and unreliable opinion of the People's witness, Dr. Murphy.

The petitioner testified on his own behalf during the first trial but did not take the witness stand at the second trial. Notwithstanding this fact, the petitioner was compelled to testify against himself by the technique pursued by the district attorney and sanctioned by the Court over petitioner's objection. The district attorney read into the record of the second trial testimony given by the petitioner during the first trial (1905, 1925).

The admission of this testimony petitioner contends was a violation of the Constitution of the State of New York,

Section 6, as well as a violation of the Fifth Amendment of the Constitution of the United States. It also violated Section 464 of the Code of Criminal Procedure (*People* v. *Ferola,* 215 N. Y. 285; *People* v. *Cummings,* 153 App. Div. 93, affd. 209 N. Y. 283).

The trial court in the present case instructed the jury as follows at folio 2678:

> *"I charge you, gentlemen, as a matter of law, that the so-called Helfand confession was not voluntarily made; that it was due to mental coercion practiced by the physician upon the defendant."* (Emphasis ours.)

And at folio 2682:

> *"In arriving at a solution of these problems I charge you that you are bound to consider the established fact that Dr. Helfand practiced illegal coercion upon the defendant and made authorized promises of leniency to him. The presumption is that such coercion and promise of leniency continued to affect the defendant's later confessions;* unless the prosecution has convinced you, beyond a reasonable doubt, from all the credible evidence in the case, that such coercion and promise of leniency did not extend over and affect the later confession made to Meenahan. Unless you are so convinced, the later confession made to Meenahan must be entirely disregarded and not considered by you as evidence of guilt." (Emphasis ours.)

And at folio 2687:

> *"Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the Court rules, as a matter of law,*

that all of the other evidence in the case offered by the prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty.'' (Emphasis ours.)

The trial court charged the jury that, as a matter of law, Dr. Helfand, acting as the district attorney's agent, had stated to petitioner that, if he confessed, he would not be prosecuted for murder in the first degree (fols. 2678-2687). (Emphasis ours.)

Undisputed Facts

1. That petitioner was questioned by the police, day and night, practically without interruption, for four days. Petitioner was not arraigned until the fifth day after the questioning commenced.

2. That Dr. Max Helfand, who committed the acts of mental coercion and made the promises of help and leniency, was employed by and was the duly authorized agent of the district attorney.

3. That the police and district attorney were present on the floor below and listened to and heard the acts of coercion, interrogations, suggestions, threats and promises of leniency meted out to the petitioner by Dr. Helfand as same came over the loud speaker attached to the microphone concealed in the inquisition room.

4. That the district attorney did absolutely nothing to prevent his representative, Dr. Helfand, from continuing these acts of mental coercion, but actually permitted and sanctioned same.

5. That all of the alleged confessions were made on the night of the fourth day of the questioning; one after another without interruption, and only after petitioner was first exposed to the mental coercion practiced by Dr. Helfand, an expert in hypnosis and psychiatry.

6. That without the alleged confessions the indictment must be dismissed, since the law of the case under the trial court's charge to the jury is:

> " * * * that all other evidence in the case even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty" (fol. 2687).

Statutes Involved

(A) Constitution of the United States,

Section 1 of the Fourteenth Amendment.

> " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law, * * *."

(B) Article Five of the Constitution of the United States:

> " * * * nor shall be compelled in any criminal case to be a witness against himself; nor shall be deprived of life, liberty, or property without due process of law; * * *."

(C) Constitution of the State of New York,

Article I, Section 6:

> " * * * nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; * * *."

(D) Code of Criminal Procedure of the State of New York:

(1) "Section 395. Confession of Defendant, When Evidence, and Its Effect.

A Confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

(2) "Section 165. Defendant, Upon Arrest, to be Taken Before Magistrate.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

(3) "Section 464. Effect of Granting New Trial.

The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument."

(4) "Section 544. New Trial.

When a new trial is ordered, it shall proceed in all respects as if no trial had been made."

(E) Penal Law of the State of New York.

"Section 1844. Delaying to Take Person Arrested for Crime Before a Magistrate.

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

(F) New York City Criminal Courts Act.

"Section 101. Courts to be Held Daily in Each District.

"Except as otherwise provided in this section, there shall be a city magistrate's court held daily in every court district, and unless otherwise directed by the chief city magistrate, each city magistrate's court shall be open every day at nine o'clock in the morning, and shall not be closed before four o'clock in the afternoon, and the city magistrate assigned thereto shall be in attendance thereat except during a reasonable recess."

(G) Civil Practice Act of the State of New York.

"Section 352. Physicians, Dentists and Nurses Not to Disclose Professional Information.

"A person duly authorized to practice physic or surgery, or dentistry, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; * * *."

Authorities Relied Upon

See:

Stroble v. *California,* 343 U. S. 181, 190;
Rochin v. *California,* 342 U. S. 165;
Gallegos v. *Nebraska,* 342 U. S. 55;
United States v. *Carnignan,* 342 U. S. 36;
Watts v. *Indiana,* 338 U. S. 49;
Turner v. *Pennsylvania,* 338 U. S. 62;
Harris v. *South Carolina,* 338 U. S. 68;
Haley v. *Ohio,* 332 U. S. 596;
Adamson v. *California,* 332 U. S. 46;
Malinski v. *New York,* 324 U. S. 401;
Ashcraft v. *Tennessee,* 322 U. S. 143;
McNabb v. *U. S.,* 318 U. S. 332;
Lyons v. *Oklahoma,* 322 U. S. 596;
Lisenba v. *California,* 314 U. S. 219;
Vernon v. *Alabama,* 313 U. S. 547;
Lomax v. *Texas,* 313 U. S. 544;
White v. *Texas,* 310 U. S. 530;
Couty v. *Alabama,* 309 U. S. 629;
Chambers v. *Florida,* 309 U. S. 227;
Pierre v. *Louisiana,* 306 U. S. 352;
Brown v. *Mississippi,* 297 U. S. 278;
Bram v. *United States,* 168 U. S. 352.

Basis of Jurisdiction

It is respectfully submitted that this Court has jurisdiction of this petition for certiorari under Sections 1257 (3) and 2101 (c), Title 28, United States Code and Rule 38-1/2 of this Court, such petition being one to review the final judgment of the Court of Appeals of the State of New York rendered October 24, 1952.

The judgment affirmed a judgment for sentence of death; and in said Court of Appeals petitioner especially set up and claimed, under the Fifth and Fourteenth Amendments of the Constitution of the United States, the rights, privileges and immunity against being deprived by the State of New York of his rights and liberty without due process of law, "and" as certified by the Court of Appeals, "this point was considered and necessarily decided by this Court" (order amending Remittitur, dated November 25, 1952).

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States: Whether the defendant was deprived of due process guaranteed by the fifth and fourteenth amendments thereof in the admission into evidence of the confessions of the defendant and in the admission into evidence of the testimony given by defendant at a prior trial. This court held that the rights of the defendant under the Fifth and Fourteenth Amendments of the Constitution of the United States had not been violated or denied."

Reasons Relied Upon for Allowance of the Writ

The Court of Appeals of the State of New York has decided several federal questions of substance in a way probably not in accord with applicable decisions of this Court.

WHEREFORE, your petitioner, Camilo Weston Leyra, respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said

Court to certify and send to this Court for review and determination as provided by law this cause and a complete transcript of the record and all the proceedings had herein; that the judgment and decision of the Court of Apepals of the State of New York affirming the judgment in this cause may be reversed and that the petitioner may have such other and further relief in the premises as to this Court may be just and proper.

Dated: New York, January 9th, 1953.

HARRY G. ANDERSON
Counsel for Petitioner

FREDERICK W. SCHOLEM
Counsel for Petitioner

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

We hereby certify that we have examined the foregoing petition for a writ of certiorari and that in our opinion it is well founded and the cause is one in which the petition should be granted.

HARRY G. ANDERSON
Counsel for Petitioner

FREDERICK W. SCHOLEM
Counsel for Petitioner

Sworn to before me this
9th day of January, 1953.

FREDA GINDER
Notary Public, State of New York
No. 31-6525050
Qualified in New York County
Certificates filed with:
Bronx, Kings County Clerks
New York, Bronx, Kings Register's Offices
Term expires March 30, 1954

APPENDIX "A"

First Opinion of Court of Appeals

Dated — April 12, 1951

302 N. Y. 355

Harry G. Anderson and Frederick W. Scholem, New York City, for appellant.

Miles F. McDonald, Dist. Atty., Brooklyn, (William I. Siegel, Brooklyn, of counsel), for respondent.

FROESSEL, *Judge.*

On the afternoon of Tuesday, January 10, 1950, Camilo Leyra, Sr., seventy-five years old, and Catherine, his wife, eighty years old, were found dead in their rear apartment on the first floor of premises 105 Quincy Street, Brooklyn. Death resulted in each case from a fractured skull, caused by several blows from a hammer. Their son, Camilo Leyra, Jr., fifty years old, is the defendant in this action. He now stands convicted of the murder of both parents, and has been sentenced to death on each of said convictions.

The verdict rests largely upon alleged confessions of the defendant. If they were properly received in evidence, followd by proper instructions from the court, the verdict would be clearly warranted, and we could not interfere with the execution of sentence for these brutal crimes. The conclusion is inescapable, however, that grave and prejudicial errors were committed with respect to these alleged confessions, so fundamental in nature as to require a reversal and a new trial. To hold otherwise would ordain the rule that the fundamental rights of a defendant to a fair trial under our laws may be deliberately disregarded if the evidence, however improper, points to the defendant's

guilt. "Such a course will simply mean in the long run the abolishing of all forms of law taught by experience to be necessary to the protection of the innocent". *People* v. *Marendi,* 213 N. Y. 600, 619, 620, 107 N. E. 1058, 1064.

It appears from the evidence in this record that defendant led a somewhat unusual life. He worked for his father as a salesman in the latter's business; at the same time he was separately engaged, on the father's premises in a partnership with one Herrschaft who was also an employee of the father; defendant also worked as night bartender in a cabaret or night club in the Greenwich Village section of New York City. For at least a year prior to the time in question, defendant claimed he had slept but four hours a night. He had a wife and three children who lived in their home in New Jersey, and whom he visited regularly at least once a week, usually over Saturday night; at the same time, however, he maintained an apartment in Greenwich Village which he shared with his paramour.

Although suspicion was not at first directed toward defendant, it was not long before the attention of the police focused upon him. He was subjected to their routine questioning on the evening of the homicides and on the following day, Wednesday, and, while a written statement was taken from him containing no admissions, he was not detained. He denied all knowledge with respect to the crimes, and told the police of his movements on the day of their commission, which included a visit to his wife in New Jersey in the morning, and attendance at his office in the afternoon, thereby tending to establish an alibi. Inasmuch as his father had not appeared at his office that day, defendant, his partner, Herrschaft, and his cousin, Valdes, called at the father's home at about 3:30 P.M., when the homicides were discovered. Defendant appeared visibly shocked by the discovery, and later stated that he

had been fearful for his parents' safety due to the deterioration of the neighborhood, and because they had had some trouble with people in the vicinity.

Because of a statement made to the police by defendant's paramour with respect to defendant's new clothing, the police inquiry continued, and defendant was taxed with discrepancies in his alibi. After accompanying detectives on Thursday morning to various places in Manhattan to check his statements, he remained in the custody of the police for all practical purposes until he was arraigned on Saturday morning, two days later. There is no evidence that the police offered him any violence during that time, but he was subjected to much questioning by detectives. Among them was Captain Meenahan, the officer in charge of the homicide squad, who questioned him intermittingly from two o'clock Thursday afternoon, throughout the night, and until about nine o'clock Friday morning. In relation to later events, it may thus be noted that defendant had no sleep whatever that night.

During this questioning, defendant made a number of very damaging admissions, to the effect, contrary to his previous statements, that, although his memory was not entirely clear, he thought he must have been at his parents' home on the preceding Tuesday morning, at or about the time of the commission of the homicides. He told of arguments with his father over the preceding weekend, and said, "Let me think this thing out." After numerous other admissions, defendant finally said, "I must have been there; I remember; definitely I was there. * * * I am certain I was there—Captain, I was there. * * * Captain, it was me. Who else could it be?" He then described how he met his mother at the door, giving all the deails of that episode, but did not admit the homicides.

At about 9:00 A.M. he was taken by detectives to attend the funeral of his parents, and upon his return to the police station signed a consent to remain in police custody. There after he was taken by two detectives to a hotel in Brooklyn where he went to a barbershop, had lunch, and was allowed to go to bed for an hour and a half, after which the detectives awakened him and returned him to the police station at about 5:00 P. M.

Defendant's principal assignments of error relate to the events which took place subsequently that evening, when he is alleged to have made several confessions. He claims (1) that these alleged confessions were obtained by unlawful methods and their admission in evidence constitutes reversible error; (2) that the court's instructions were erroneous, and (3) that the alleged confessions were obtained by hypnosis and their receipt in evidence was prejudicial error.

Not content with the admissions already made by defendant to Captain Meenahan, the latter, at about 7:00 P. M. on that evening, introduced defendant to a physician, who is also a specialist in neurology and psychiatry, a psychologist, and one who uses the technique of psychoanalysis in his practice. This doctor, unconnected with the police department or the prosecutor's office, had been called to the police station by the District Attorney, who outlined the case to him. The doctor had also been "briefed" by Captain Meenahan, as is manifest from the questions he asked. He agreed to talk to defendant upon condition that there be no one else in the room; he knew, however, that the room was wired and that the interview would be electrically recorded by a recording machine, which was specially set up that day. The police and the District Attorney were in the basement of the police station, where

they overheard the entire interview and permitted it to continue uninterruptedly.

The doctor spent an hour or an hour and a half with defendant. A transcript of the recorded interview shows that he told defendant at the outset: "I'll tell you what the purpose of my talk to you is. I want to see if I can help you." To this defendant answered: "Yes, Doctor." The doctor asked him about his sinus condition and the treatment he had had, and in the course of the interview said: "I'm your doctor." The transcript further discloses that on at least forty occasions the doctor in one way or another promised to help defendant, and on one occasion said: "I know you are in a little trouble. We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things that we aren't really responsible for. I want to see whether or not you did something but which you've done in a fit of temper or anger. Do you understand me? A. Yes." Defendant told the doctor he was "very tired. I had two hours sleep. Just now they woke me up That's since Tuesday. Well, there were questions, after questions after questions by the thousands. * * * The only thing is I'm very tired. I didn't feel as tired before I went to bed as I do now. You know (interruption)". This interruption was said to be noise, but no one knows what else defendant said here. It happened numerous times throughout the recording. So with whispers, identified by the doctor as sounds made by defendant when he did not speak audibly. In these respects the statement is definitely incomplete. Defendant then stated that his sinus was "bothering" him "something terrible", and that for the past two years he had averaged over a hundred hours of work a week without vacation. After more conversation, the following took place:

"Q. I want you to recollect and tell me everything. I am going to make you remember and recollect back and bring back thoughts—thoughts which you think you might have forgotten. I can make you recollect them. It's entirely to your benefit to recollect them because, you see, you're a nervous boy. You got irritable and you might have got in a fit of temper. Tell me, I am here to help you. A. I wish you could, Doctor.

"Q. I am going to put my hand on your forehead and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. I am going to keep my hand on your forehead and I am going to ask you questions and now you will be able to tell me."

This technique—of promising help, such as "We'll help", "Everybody will help you", "We're with you one hundred percent", "We'll play ball with you"; placing his hands on defendant's head; "making" him recollect; minimizing the homicides by suggesting they were done in a fit of temper saying, "Morally, you are not to be condemned, right? A. Right"; commanding defendant to look at him, to open and close his eyes; suggestions to defendant as to what he should say—runs all through the transcript of the recording.

The doctor was making some progress in breaking down defendant and getting some admissions, knowing that defendant was under "tension", "pale", his mouth was "dry", and despite defendant's frequent "I can't remember", "Doc, I'm trying so hard", "Doctor, I'm exhausted, so please be patient." The doctor kept at him: "See, I can make you talk very truly. I can give you an injection now." Near the end of the interview the following occurred:

Appendix "A"

"Q. You have a much better chance to play ball (Noise) than if you say you don't remember. If you tell me that you were in a fit of anger, that you were angry, that you just swung the hammer but if you tell me that you don't remember, then you will be working against yourself. Where will it get you? A. At that point there, I was so mad. I was like white hot metal. I was so mad. I was never mad at anyone in my life * * * (Noise) * * * "Q. Do you feel better? * * * (Noise) * * * Do you want coffee? A. I drank coffee all night long * * * (Noise) * * * " (asterisks *sic*).

What happened during these "Noise" periods, we do not know; why the doctor suddenly asked defendant after an interruption, "Do you feel better?", followed by another interruption, is unexplained. In any event, the doctor continued with this significant question: "Q. These people are going to throw the book at you unless you can show that in a fit of temper you got so angry that you did it. Otherwise they toos [toss] premeditation in and it's premeditation. See?" The import of this language should not be overlooked.

After some more coffee, defendant asked to speak to Captain Meenahan, whereupon he made a full and detailed confession to both homicides, in the course of which he stated he lost his temper and was overcome by a fit of anger and rage. Following his confession to Captain Mennahan, he told his partner, Herrschaft, who had been directed by a detective to be present, that he "did it." Thereafter and during the same evening, defendant again confessed these crimes to two assistant district attorneys, who took the written statement from him offered in evidence. He was fingerprinted that night and arraigned the next morning.

[1, 2] The chief issue raised by defendant at the trial is concerned with the claim that defendant was hypnotized by the doctor; that all of the confessions of Friday evening were made under that hypnotic influence; and that they were involuntary and untrue. He denied that he killed his parents, and asserted that he did not know what happened within a few minutes of the time he started talking to the doctor and the following Sunday morning, when he claims to have recovered volition and memory while in jail. He further stated that the doctor had made various gestures, first with his hands and then with some object, after which he recalled nothing. After defendant testified, followed by two psychiatrists who were called on his behalf, one of whom stated that the doctor's actions could have been nothing but hypnotism, the doctor was called in rebuttal, asserting unequivocally that he had not hypnotized this defendant.

Since the issue of hypnotism was one of fact concerned largely with the credibility of defendant as against that of the doctor, and that issue was quite fully and impartially presented to the jury, there is no reason why we should now interfere with that finding. People v. Peller, 291 N. Y. 438, 446, 52 N. E. 2d 939, 942. Because the jury decided adversely to defendant on this issue, however, it does not necessarily follow that the confessions obtained Friday evening were voluntary within the meaning of section 395 of the Code of Criminal Procedure or that there was no violation of the requirements of due process; and because defendant denied having made these confessions, he is not precluded from contending that in the event it be determined that he did make them, they were in violation of constitutional and statutory safeguards. U. S. Const., 14th

Amendt.; N. Y. Const., art. 1, §6; Code Crim. Proc. §395; People v. Joyce, 233 N. Y. 61, 71, 134 N. E. 836, 840; Lee v. State of Mississippi, 332 U. S. 742, 744-745, 68 S. Ct. 300, 92 L. Ed. 330; Ashcraft v. State of Tennessee, 322 U. S. 143, 151-154, 64 S. Ct. 921, 88 L. Ed. 1192; White v. State of Texas, 310 U. S. 530, 532, 60 S. Ct. 1032, 84 L. Ed. 1342.

[3, 4] We are thus squarely confronted with the question as to whether or not the admissions in defendant's statement to the doctor were properly received and submitted to the jury, as evidence from which they might determine his guilt. We think not, and, under the circumstances here disclosed, the trial court should have so determined as a matter of law; it is the duty of the court to reject a confession if a verdict that it was freely made would be against the weight of the evidence. People v. Doran, 246 N. Y. 409, 159 N. E. 379; People v. Valletutti, 297 N. Y. 226, 78 N. E. 2d 485. Bearing in mind the undisputed setting in which this interview was arranged and recorded, while defendant was in custody of the police; defendant's psysical and mental condition at the time, already alluded to; the psychiatrist, calling himself defendant's doctor, playing upon the latter's natural fears and hopes, pressing his hands upon defendant's head with accompanying commands, and suggesting details to an unwilling mind by persistent and unceasing questioning; informing defendant that he was not morally responsible; making deceptive offers of friendship and numerous promises, express and implied; giving assurances in a psuedo-confidential atmosphere of physician and patient; and all the attendant circumstances taken together—this interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution,

we may not countenance here. No such intrusion may be sanctioned in a system of law which is based upon the presumption of innocence, surrounded by the constitutional safeguards afforded to every individual. The doctor here did not tell defendant that he had been called into the case by the District Attorney; that the latter and the police were listening to their conversation; that defendant could have his own doctor or lawyer or any one else present; he conspicuously omitted to tell defendant that he was under no duty to speak or that anything he might say could be used against him. See People v. Fernandez, 301 N. Y. 302, 333, 93 N. E. 2d 859; People v. Esposito, 287 N. Y. 389, 398, 39 N. E. 2d 925, 928, 142 A. L. R. 956.

[5, 7] We are, of course, not unmindful of the fact that some of these circumstances, standing alone, such as defendant's being in custody of the police, Murphy v. People, 63 N. Y. 590; People v. Perez, 300 N. Y. 208, 90 N. E. 2d 40, or mere failure to warn defendant that he was under no obligation to speak or that anything he might say could be used against him, People v. Randazzio, 194 N. Y. 147, 87 N. E. 112, would not constitute ground for excluding his confession. But here we have much more. Moreover, while deception alone, or a mere violation of confidence by a doctor in the sense that he has voluntarily disclosed to the police a confidential communication received in the usual practice of his profession, may not render a confession invalid, see People v. Wentz, 37 N. Y. 303; People v. Buffom, 214 N. Y. 53, 56, 57, 108 N. E. 184, 185, 186, this court is unwilling to assent to the doctrine that representatives of the State may thus employ a relationship they established between the doctor and this defendant, which is of a character that our public policy holds privi-

leged, Civil Practice Act, §352, in order to obtain a confession out of defendant's own mouth without warning and under the circumstances here disclosed. People v. Fernandez, supra; People v. Esposito, supra; People v. Furlong, 187 N. Y. 198, 212, 79 N. E. 978, 983. If a physician may be thus used, then why not a lawyer or a clergyman? The essential fairness which is supposed to form the warp and woof of our fabric of justice would certainly be wanting if practices such as these were to be approved. See People v. Levan, 295 N. Y. 26, 64 N. E. 2d 341.

[8, 10] We have held that an involuntary confession is by its very nature evidence of nothing. People v. Valletutti, supra, 297 N. Y. at page 231, 78 N. E. 2d at page 487. Moreover, our Federal Constitution, 14th Amendt., is a bar to the conviction of any individual in our courts of justice by means of a coerced confession. Ashcraft v. State of Tennessee, supra. We have a like provision in section 6 of article I of our State Constitution. A denial of due process has been defined as the failure to "observe that fundamental fairness essential to the very concept of justice. * * * Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt." Lisenba v. People of State of California, 314 U. S. 219, 236-237, 62 S. Ct. 280, 290, 86 L. Ed. 166. Not only is the use of a coerced confession in obtaining a conviction a violation of due process, but, if such confession is admitted in evidence, that is sufficient to void the conviction regardless of other evidence which might nevertheless demonstrate guilt, Malinski v. People of State of New York, 324 U. S. 401, 65 S. Ct. 781, 89 L. Ed. 1029, see, Note, 93 L. Ed. 115; Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; Turner v. Commonwealth of Pennsylvania, 338

U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810; Harris v. State of South Carolina, 338 U. S. 68, 69 S. Ct. 1354, 93 L. Ed. 1815; Haley v. State of Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224; Ashcraft v. State of Tennessee, supra; Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716.

[11] We recognize that due process is not lacking where upon facts *permitting different conclusions* it is left for the jury, under a proper submission, to say whether or not there was coercion, Malinski v. People of State of New York, supra; Lisenba v. People of State of California, supra; Lyons v. State of Oklahoma, 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481, but here the method employed is not controverted and the statement itself is beyond dispute, for it is recorded. The transcript of the recording clearly discloses that the interview took place in an atmosphere of the utmost pressure, and in a manner and with a skill possible only to an experienced psychiatrist, unfamiliar with an accused's fundamental rights. As the prosecutor said of this psychiatrist in his summation: "with his superior mental powers, his studies of psychology, he was able to accomplish what a brow-beating policeman might not have been able to obtain." This was an eloquent tribute to the efficacy of mental coercion over physical.

Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. A confession by which a person forfeits his life must be grounded on reasoned and voluntary choice. We would have to close our minds to the plain import of what occurred to deny that here was a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at

the same time conducting an unrelenting interrogation of the exhausted accused. Aside from constitutional objections we have not yet reached the stage where medical science, represented by an accord among its experts, establishes the trustworthiness of a confession induced by the means here adopted. See 3 Wigmore on Evidence [3d ed.], §841a; People v. Forte, 279 N. Y. 204, 206, 18 N. E. 2d 31, 32, 119 A. L. R. 1198. Due process of law guaranteed by our State and Federal Constitutions commands that no such practice as revealed by this record shall send an accused to his doom, regardless of the brutality of the crimes with which he is charged.

[12, 13] While it is true that the statement in question was admitted as part of the People's case by way of rebuttal on the issue of hypnotism, yet, for the reasons hereinbefore assigned, the admissions contained therein should not have been received and permitted to go to the jury as evidence from which they might determine defendant's guilt. Although defendant vacillated with respect to his objections to this statement to the doctor, his counsel did attack it on the broad ground that defendant's will was wholly subservient by reason of hypnotism. Although the attack on that ground was rejected by the jury, this failure did not militate against his right to claim that his confession was nevertheless involuntary, particularly in view of the fact that after the court's charge his counsel excepted "to the whole charge of the Court on the question of a valid confession". In any event, in a capital case we have the power to order a new trial in the interests of justice, whether or not an exception shall have been properly taken in the court below. Code Crim. Proc., §528.

[14] Whether the coercion which we find implicit in defendant's statement to the doctor extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remains a question of fact for determination by the jury, and this question was never properly submitted to them. These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions. Only thus would due process of law be accorded defendant. Lyons v. State of Oklahoma, supra.

[15] Another alleged infirmity in defendant's statement to the doctor is urged upon it. It is said that this statement contained promises of leniency which might be attributed, under the circumstances, to the District Attorney. Code Crim. Proc., §395; People v. Kurtz, 42 Hun 335; People v. Reilly, 224 N. Y. 90, 120 N. E. 113. The court at first instructed the jury that "There is no claim here that the District Attorney induced this defendant to make a confession upon the promise that he will not be prosecuted therefor." Defendant's counsel duly excepted, and requested an appropriate charge from the court, which might eliminate premeditated murder. After some colloquy the court agreed, withdrew its original instructions in this respect, and then charged the jury in effect that they had to find a promise of complete immunity by the doctor or none at all, and only if the jury found that the former induced the confession might they acquit. While this may have been inadvertent on the part of the trial court, this instruction, to say the least, was misleading and did not

cure the original instruction excepted to by defendant and which the court agreed to correct, and may well have been detrimental to defendant, particularly in the light of the doctor's statement to him that; "unless you can show that in a fit of temper you got so angry that you did it * * * it's premeditation. See?" People v. Mleczko, 298 N. Y. 153, 162, 81 N. E. 2d 65, Code Crim. Proc. §528. Moreover, here again the jury should have been instructed to consider separately the later confessions, in the light of any promise that may have been made during defendant's statement to the doctor. Lyons v. State of Oklahoma, supra.

While portions of the closing statements of the prosecutor relating to defendant's criminal record, and statements of the doctor concerning defendant's guilt and that he was lying, of which the learned court below took cognizance, were highly improper, they and other errors assigned require no further comment in view of the conclusion we have reached. However shocking the crimes of which defendant was convicted, his life may not be forfeited in the light of the foregoing prejudicial errors, which deprived him of his substantial rights, accorded under our laws. People v. Moran, 246 N. Y. 100, 106, 158 N. E. 35, 37; People v. Levan, supra; People v. Mleczko, supra; People v. Samuels, 302 N. Y. 163, 173, 96 N. E. 2d 757, 762.

The judgments of conviction should be reversed and a new trial ordered.

LOUGHRAN, *C. J.*, and LEWIS, CONWAY, DESMOND, DYE and FULD, *JJ.*, concur.

Judgments of conviction reversed.

APPENDIX "B"

Second Opinion of Court of Appeals

Date — October 24, 1952

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CAMILO WESTON LEYRA, Appellant.

Decided October 24, 1952.

DYE, J. When we reversed the prior judgment of conviction and ordered a new trial on the ground that the defendant's confession to Dr. Helfand was coerced as a matter of law, we thereby ruled it out for any further consideration on the issue of defendant's guilt (*People* v. *Leyra,* 302 N. Y. 353). By this ruling we did not invalidate the statements subsequently made by defendant to other persons and specifically left their validity open for separate consideration by a later jury as an issue of fact whether all or any of such statements depended on the mental coercion practiced by Dr. Helfand and then "only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions * * * (*Lyons* v. *Oklahoma, supra*) [322 U. S. 596]." (*People* v. *Leyra, supra,* p. 366.)

At the prior trial it had also been contended that a statement by Dr. Helfand contained a promise of leniency which might be attributed under the circumstances to the District Attorney. This required no definitive ruling from us as we had already declared the confession invalid for coercion, but we did not thereby overlook the possible influence of the alleged promise on the later statements, by way of inducement, and just as in the case of the mental coercion, we specifically left it for the jury to consider *separately* in the light of any promise of leniency, for it was only in

that manner that due process could be afforded (*Lyons* v. *Oklahoma, supra; Malinski* v. *New York,* 324 U. S. 401).

According to the record now before us, the Helfand confession was again received in evidence "merely on the question as to whether or not whatever statements the defendant made * * * were inspired" by Dr. Helfand, an issue raised by defense counsel. This was received after the trial court had cautioned counsel at length, followed by a most explicit and detailed instruction to the jury as to its illegality phrased in most simple and understandable language that they might not consider it on the issue of guilt under "any circumstances", but were limited to a consideration of its effect on the later confessions, and that these too were to be entirely disregarded if found to be dependent upon it in any respect whatsoever, a distinction which each individual juror signified that he understood. The Trial Judge did not stop there but dealt with it in his main charge and we believe fully and adequately by pointing out again and again that as a matter of law the confession made to Dr. Helfand was not to be considered on the issue of guilt. Moreover, he was careful to instruct the jury as to the defendant's contention leaving them to say with what force and effect "the coercion and promise * * * did in fact carry over and into each of the subsequent confessions" at the same time giving like instruction as to the People's contention, leaving it for the jury to say whether the later confessions made to other persons "were entirely voluntary and not induced by any promise of leniency."

In this manner and by this means the defendant's statement to Dr. Helfand was effectively insulated from the jury for consideration on the issue of guilt and was made available to them for the sole and limited purpose of saying whether or not the later statements made to others were

dependent in any way on coercion or inducement, coupled with the clear and positive instruction that if so found to be, it was "worthless as evidence". Such submission for separate consideration was in obedience to our specific ruling at the prior trial.

When the Trial Judge charged that as a matter of law a promise of leniency had been made by Dr. Helfand, he did not thereby make that statement "the law of the case" to such an extent as to deprive the jury of the benefit of his instruction as to "carry over and inducement". That was the precise issue they were required to pass upon. The "law of the case" governing the jurors in their deliberations is to be found in the charge in its entirety and is not to be taken from a ruling concerning the limited nature and effect of a single item of evidence, particularly, when the point said to be prejudicial, as here, has been specifically excluded. The law governing the retrial of this case was explicitly laid down by us at the prior trial which was that the statement to Dr. Helfand was coerced and worthless as evidence. The circumstance that the Trial Judge also said it was worthless, because a promise had been made as a matter of law, did not in any way prejudice the defendant. It was, if anything, to his advantage.

The judgment of conviction should be affirmed.

FULD, J. (dissenting). To see this case whole and in proper focus, it must be borne in mind that defendant's conviction rests solely upon his confessions and that the trial court so charged the jury, advising that, absent those confessions, "defendant must be acquitted, for the reason that the Court rules, as a matter of law, that all of the other evidence in the case * * * even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty."

Appendix "B"

The trial judge charged unequivocally that Dr. Helfand had promised defendant, "in order to induce him to confess," that he would not be prosecuted for murder in the first degree, that such promise was authorized by the district attorney and that defendant confessed in reliance upon it. Consequently, as the trial court went on to charge, that confession was inadmissible as a matter of law. (See Code Crim. Pro. §395.) In view of that charge—which, of course, became the law of the case—it necessarily follows, as a matter of ineluctable logic, that any and all other confessions to the district attorney or those associated with him in the investigation and prosecution of this very homicide, must also be deemed to have been induced by that promise, and likewise inadmissible. Accordingly, when the court further instructed the jury that it might find that the confessions to assistants of the district attorney and to a police captain—made within an hour or two after immunity had been promised—had not been induced by the promise, it pursued a course that was not only opposed to logic, but incompatible with the law of the case. That was error highly prejudicial to defendant.

Nor does the existence of the confession that defendant made to Herrschaft, his friend and business associate, change the situation or permit an affirmance. True, that confession may stand in a category different from those made to prosecutor and police; other considerations, considerations separate and apart from the district attorney's promise, may have prompted defendant to confess to his friend. I am willing to assume, therefore, that the court was warranted in leaving to the jury the question whether or not the promise induced defendant's confession to Herrschaft, but that does not dispose of the matter. Since the jury also had before it the two confessions made to the law

enforcement officials, and since those confessions played a not unimportant part at the trial, no court can say that the jury, in reaching its verdict, either relied solely upon the confession to Herrschaft or disregarded entirely the other confessions. That being so, the conviction cannot be upheld. (Cf. *Stroble* v. *California*, 343 U. S. 181, 190.)

I would reverse the judgment and order a new trial.

LEWIS and DESMOND, JJ., concur with DYE, J.; FROESSEL, J., concurs for affirmance under the provisions of section 542 of the Code of Criminal Procedure; FULD, J., dissents in opinion in which LOUGHRAN, Ch. J., concurs; CONWAY, J., not sitting.

Judgment of conviction affirmed.

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 302 N. Y. 353, a copy of which is in Appendix "A" attached to the petition. The opinion on the second appeal to the Court of Appeals is reported in 304 N. Y. 468 and can be found in Appendix "B" attached to the petition annexed hereto.

Statement of Jurisdiction, Questions Presented and Facts

For brevity, there will not be repeated here the Statement of Jurisdiction, the questions presented and the pertinent factual matter, all of which appear in the petition to which this brief is annexed.

Argument

I.

Petitioner contends that the due process clause of the Fourteenth Amendment was violated by reason of the fact that there was admitted into evidence alleged confessions of the petitioner which were obtained by Dr. Max Helfand, a psychiatrist, the duly authorized agent of the district attorney, after mental coercion was practiced upon the petitioner. Petitioner further contends that the due process clause of the Fourteenth Amendment was also violated by reason of the fact that the duly authorized agent of the district attorney promised the petitioner that if he confessed he would not be prosecuted for murder in the first degree.

Petitioner contends that the Fifth Amendment to the Constitution of the United States was violated by reason of the fact that the petitioner was compelled to be a witness against himself in that his testimony given at a prior trial was read into evidence, over objection and exception, at the present trial at which the petitioner did not take the witness stand and was not a witness.

Petitioner further contends that the Fourteenth Amendment of the Constitution of the United States was violated in that he was interrogated by the police for four nights and four days without arraignment, during which time he was questioned in relays by the police and asked thousands upon thousands of questions. This interrogation was immediately followed by the employment of Dr. Max Helfand, a psychiatrist, who had previously been briefed by the district attorney and who threatened to give the petitioner an injection to make him talk. This psychiatrist further represented himself to be the petitioner's doctor, prom-

ised to help the petitioner and also promised that if the petitioner confessed he would not be prosecuted for murder in the first degree (see *Haley* v. *Ohio*, 332 U. S. 596 and *McNabb* v. *United States*, 318 U. S. 332, 342, 343). Under the Code of Criminal Procedure of the State of New York, Section 165 provides that the defendant must in all cases be taken before the magistrate without unnecessary delay. This was deliberately violated. The Penal Law of the State of New York, Section 1844, provides:

> "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

The New York City Criminal Courts Act, Section 101, provides that courts are held daily in each district of the City of New York, are open every day at 9:00 o'clock in the morning and shall not be closed before 4:00 o'clock in the afternoon.

During the four days of interrogation by the police of the petitioner, the petitioner emphatically denied any connection whatsoever with the crime. When the police failed to obtain the confession after four days of questioning of the petitioner, they reported this fact to the District Attorney of Kings County who thereupon personally employed a psychiatrist, Dr. Helfand, without limitation as to the methods to be used by him to extract a confession from the petitioner. The district attorney heard over the loud speaker the technique used by the psychiatrist, as well as the threats and promises made by the psychiatrist, but the district attorney made no effort to repudiate any of the promises or threats made by Dr. Helfand, nor did he discourage Dr. Helfand from the use of mental coercion, etc.

The alleged confessions were plainly the product of the suction process of interrogation and, therefore, the reverse of voluntary.

It is significant that the district attorney made no effort to disavow any of the promises or acts committed by the psychiatrist. It is significant to note that neither the district attorney nor the assistant district attorneys, who subsequently took the alleged confessions, apprised the petitioner of his constitutional rights. Indeed, upon the first trial, the district attorney approved the methods of Dr. Helfand and as stated by Mr. Justice Froessel in his opinion in the Court of Appeals (302 N. Y. 353 at p. 364; see Appendix "A"):

> "As the prosecutor said of this psychiatrist in his summation: 'With his superior mental powers, his study of psychiatry, he was able to accomplish what a brow-beating policeman might not have been able to obtain'. This was an eloquent tribute to the efficacy of mental coercion over physical."

All of the aforementioned facts were undisputed on the first trial as well as during the present trial.

It is important at this point to call attention to the fact that the psychiatrist employed by the district attorney, Dr. Max Helfand, falsely represented himself to be the petitioner's doctor called in to treat his sinus condition. The Civil Practice Act of the State of New York, Section 352, provides:

> "A person duly authorized to practice physic or surgery or dentistry, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a

professional capacity and which was necessary to enable him to act in that capacity."

The disclosure by the psychiatrist, Dr. Max Helfand, of information obtained from the petitioner was a distinct violation of this statute.

Judge Froessel stated at page 363 of his opinion:

> "If a physician may be thus used, then why not a lawyer or a clergyman? The essential fairness which is supposed to form the warp and woof of our fabric of justice would certainly be wanting if practices such as these were to be approved."

The court was compelled to charge the jury, as a matter of law, in the present trial (fols. 2678-2687):

> *"I charge you gentlemen as a matter of law, that the so-called Helfand confession was not voluntarily made: that it was due to mental coercion practiced by the physician upon the defendant; that in and of itself, renders it worthless as evidence of guilt."* (Emphasis ours.)

The trial court instructed the jury further:

> *"I charge you also as a matter of law that this so-called Helfand confession is invalid and may not be considered by you as evidence of guilt on the further ground that Dr. Helfand, who was then acting for the District Attorney, made a promise to the defendant in order to induce him to confess, and, thus, did induce him to confess by reason of said promise."* (Emphasis ours.)

This instruction was required by reason of the opinion of Judge Froessel in the Court of Appeals on the first appeal. This opinion was concurred in by all of the judges.

The court further charged:

> *"In arriving at a solution to these problems, I charge you that you are bound to consider the established fact that Dr. Helfand practiced illegal coercion upon the defendant and made authorized promises of leniency to him."* (Emphasis ours.)

At folio 2687, the trial court charged the jury:

> *"Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the court rules as a matter of law that all of the other evidence in the case offered by the prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty."* (Emphasis ours.)

For purpose of brevity the petitioner will not repeat the technique pursued by the psychiatrist, Dr. Helfand, since it is graphically described in detail by Judge Froessel, at pages 359 to 361. In clearly recognizing the mental coercion practiced upon the petitioner by the psychiatrist, Dr. Max Helfand, Judge Froessel further stated at page 364 of his opinion in the first appeal:

> "Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. A confession by which a person forfeits his life must be grounded on reason and voluntary choice. We would have to close our minds to the plain import of what occurred to deny here was a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be the defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation

> of the exhausted accused. Aside from constitutional objections, we have not yet reached the stage where medical science represented by an accord among its experts establishes the trustworthiness of a confession induced by the means here adopted. Due process of law guaranteed by our State and Federal Constitutions demands that no such practice as revealed by this record shall send an accused to his doom, regardless of the brutality of the crimes with which he is charged."

The petitioner contends that all of the alleged confessions are actually in fact but one confession since the confession began with Dr. Max Helfand, the psychiatrist, and continued without pause or interruption and followed one after another with the assent of the district attorney; the petitioner further contends that these alleged confessions were all infected with the virus of mental coercion. All of the alleged confessions took place on the same night of January 13th, 1950, and continued without pause for a period of four hours. These facts were not disputed by the district attorney.

It is also significant to point out that throughout the recording of the inquisitorial tactics pursued by the psychiatrist, Dr. Max Helfand, there were recorded numerous instances of "whispers" and "noises" and interruptions as recorded on the tape recordings which mechanism was installed by the police and sanctioned by the district attorney who personally heard what was transpiring in the secret and private room on the upper floor of the police station. One does not know what occurred and what acts were committed by the psychiatrist on the petitioner during these periods of "whispers", "noises" and interruptions, since Dr. Helfand insisted upon being alone with defendant

during this unusual "sinus" treatment. It is obvious that this condition was imposed by Dr. Helfand since he did not wish to have witnesses to his illegal and unconscionable acts. Dr. Helfand tried to explain away these periods of noises, whispers and interruptions by saying that the noises emanated from the traffic on the street. One might well suspect that this unscrupulous psychiatrist, who threatened to give the petitioner an injection, during these periods of noises, whispers and interruptions, took from his pocket a needle or syringe and threatened to or actually did give the petitioner an injection of sodium pentathol or other truth serum. As Judge Froessel pointed out in his opinion, at page 361:

> "What happened during these 'noise' periods, we do not know; why the doctor suddenly asked defendant after an interruption, 'Do you feel better?' followed by another interruption is unexplained. In any event, the doctor continued with this significant question: 'Q. These people are going to throw the book at you unless you can show that in a fit of temper you got so angry that you did it. Otherwise they toos (toss) premeditatio in and it's premeditation. See?' The import of this language cannot be overlooked."

It is idle for the district attorney to contend that this threat to give the petitioner an injection did not carry over into all of the alleged confessions. It is further idle for the district attorney to contend that the promises made by his authorized agent, Dr. Max Helfand, did not carry over into all of the alleged confessions. The district attorney, who personally called Dr. Max Helfand and employed this psychiatrist, to extort a confession since the police were unable to obtain such a confession, then wrote a letter to

the Comptroller of the City of New York requesting the Comptroller to pay Dr. Helfand's bill totaling the sum of $2,175.00 (fols. 1577, 1578; Deft's Ex. 3), for his services rendered in obtaining this confession in which letter the district attorney stated, among other things: "Dr. Helfand was instrumental in obtaining the defendant's confession."

Petitioner's attorney offered in evidence the letter in question written by the district attorney. The district attorney, however, objected to this proof and the letter in question was marked for identification (Deft's Ex. "A"; fol. 1583; Appendix D, Brief p. 29).

II.

Upon the present trial the sole issue remains as to whether the mental coercion, exercised by Dr. Max Helfand, carried over into the alleged subsequent confessions as indicated by the Court of Appeals in its first opinion by Judge Froessel in reversing the first conviction. The district attorney's position upon the present trial was that Dr. Helfand's technique and methods were "severable from the confessions made to Captain Meenahan, Assistant District Attorneys Andreozzi and Gitlin, and the People's witness, Herrschaft." The district attorney took this position notwithstanding the trial court's charge that, as a matter of law, Dr. Helfand had employed "mental coercion" in his efforts to induce the petitioner to confess, and notwithstanding the further fact that the trial court charged the jury that as a matter of law Dr. Helfand promised the defendant that if he confessed, he would not be prosecuted for the crime of murder in the first degree.

Judge Fuld, in his dissenting opinion in which Chief Judge Loughran concurred, wrote:

"In view of that charge, which, of course, became the law of the case, it necessarily followed as a matter of ineluctible logic that any and all other confessions to the district attorney or those associated with him in the investigation and prosecution of this very homicide, must also be deemed to have been induced by that promise. Accordingly, when the court further instructed the jury that it might find that the confessions to the assistants of the District Attorney and to the Police Captain—within an hour or two after immunity had been promised—had not been induced by the promise, it pursued a course that was repugnant to the law of the case. That was error highly prejudicial to the defendant." (Italics ours.)

This point made by Judge Fuld with regard to the promise, or the view taken by Judge Fuld with respect to the promise, certainly is applicable to the mental coercion since as a matter of law and as a matter of fact mental coercion is much more effective to procure a confession than a promise. It must not be overlooked that the trial court instructed the jury that the methods used by Dr. Helfand was mental coercion and illegal. During the interrogation of the petitioner by Dr. Helfand, the doctor said, among other things, "I CAN GIVE YOU AN INJECTION." This is unquestionably the strongest type of mental coercion and the other methods employed, to wit, holding his hands on petitioner's head, rubbing petitioner's forehead, massaging the petitioner's temples and compelling the petitioner to open and close his eyes, to stare into the psychiatrist's eyes and much more to the same effect, and repeatedly stating on at least forty occasions: "I'm going to help you. I'm with you 100%. We are all working with you. I'm your doctor. I'm going to help you. I'm with you 100%. God will be with you."

There can be no question that the acts and the technique of Dr. Helfand were definitely mental coercion. It is significant that Dr. Helfand insisted, as a condition to his employment, that he be alone in the captain's room with the petitioner. It is obvious that Dr. Helfand did not want any witnesses to his illegal and unconscionable acts. Fortunately for the petitioner, the wire recordings reveal all of the technique except what occurred during the "whispers", "noises" and "interruption" periods.

The legal definition of coercion is set forth in 14 C. J. S. 1307:

> "Coercion. Although it is difficult to define the term sharply, coercion exists where one is, by the unlawful conduct of another, induced to do or perform some act under circumstances which deprive him of the exercise of his free will; it may be either actual (direct or positive), where physical force is put on a man to compel him to do an act against his will, or implied (legal or constructive) where the relation of the parties is such that one is under subjection to the other, and thereby constrained to do what his free will would refuse. Violence has been held not to be an essential element, for coercion is usually accomplished by indirect means, such as threats or intimidation, physical force being more rarely employed, and may include a compulsion brought about by moral force or in some other manner with or without physical force. Moreover, it has been held that coercion may be accomplished without threats. While coercion does not necessarily imply force and violence or threats of its immediate use, the word does imply necessarily an actual overriding of the judgment and will, and, in particular connections, by an act which is itself unlawful, but

> the mere giving of information on request and the presentation of facts does not constitute coercion."

As Judge Froessel of the Court of Appeals stated in reversing the first conviction at page 363:

> "If a physician may thus be used, then why not a lawyer or a clergyman? The essential fairness which is supposed to form the warp and wool of our fabric of justice would certainly be wanting if practices such as these were to be approved."

And later at page 364 the Court in referring to the summation of the district attorney in evaluating Dr. Helfand's services said:

> "As the prosecutor said of this psychiatrist in his summation: 'with his superior mental powers, his studies of psychology, he was able to accomplish what a brow-beating policeman might not have been able to obtain.' This was an eloquent tribute to the efficacy of mental coercion over physical."

The coercion was not of the old-fashioned brand. No hard-swinging rubber hose; no bright lights scorching the eyes of the suspect; no detectives getting tough and fresh in relays; no "can of bones" as in the case of *Lyons* v. *Oklahoma,* 322 U. S. 596. Not one of the old props familiar to this court. There were soft words only; quiet, coaxing words in an endless stream from a specialist in neurology and psychiatry. The relaxing fingers of the psychiatrist soothingly caressed the petitioner's forehead, neck and temples.

Then Dr. Helfand gave reassuring promises that he was really petitioner's doctor, intent only on helping him. The doctor then promised that if the petitioner confessed, peti-

tioner would not be prosecuted for murder in the first degree. Dr. Helfand then used his final weapon, "I CAN GIVE YOU AN INJECTION AND MAKE YOU TALK." Then this psychiatrist put words in the petitioner's mouth and thoughts in the petitioner's mind. Then came confession after confession without interruption or pause. Nobody, no matter how innocent, could withstand being exposed to "the ceaseless pressure of a skillful psychiatrist's peculiar technique."

Upon the present trial the district attorney took the position that the effect of the promise made to petitioner by Dr. Helfand hat he would not be prosecuted for murder in the first degree, if he confessed, came to an end when Dr. Helfand that he would not be prosecuted for murder tioner over to Captain Meenahan in the room where Dr. Helfand had operated. This contention is completely disproved by the fact that petitioner called the Captain "Doc" when the Captain took Dr. Helfand's seat in the inquisition room after Dr. Helfand had completed his technique (People's Ex. D1 and part of C3, p. 616).* The district attorney's contention is based solely upon the opinion given by Dr. Murphy, a psychiatrist designated by the trial court to be a witness for the prosecution (fols. 2261, 2262):

> "The Court: What about the promise?
>
> "The Witness: I don't know what effect the promise had. It is a thing which is something I cannot pass judgment upon.
>
> "The Court: In that particular instance?
>
> The Witness: That is right."

---

* These recordings were put into evidence but were not transcribed for second trial. The statement in which petitioner called Captain Meenahan "Doc" appears at fol. 2211 of the first record and is contained in People's Ex. D1 and part of C in the present record.

Dr. Murphy also testified that in his opinion the mental coercion brought about by Dr. Helfand did not carry over to the alleged confessions made to Captain Meenahan and Assistant District Attorneys Andreozzi and Gitlin. Dr. Murphy had never seen the petitioner prior to this session in court and never examined the petitioner at any time. Therefore, Dr. Murphy's testimony was completely without value inasmuch as he had no actual knowledge of petitioner's mental and physical condition following Dr. Helfand's machinations which occurred two years before Dr. Murphy testified. Furthermore, the Court should bear in mind the important fact that the recording of what took place between Dr. Helfand and the petitioner was incomplete. As an indication of these, omissions, we quote from Judge Froessel's opinion:

> "The recording is replete with noises and interruptions" (fol. 822).

Dr. Helfand's testimony was to the effect that these noises proceeded from traffic on the street.

Judge Froessel continued in his opinion upon the first appeal at page 360:

> "The doctor was making some progress in breaking down defendant and getting some admissions, knowing that defendant was under 'tension', 'pale', his mouth was 'dry', and despite defendant's frequent 'I can't remember', 'Doc, I'm trying so hard', 'Doctor, I'm exhausted, so please be patient'. The doctor kept at him: 'SEE, I CAN MAKE YOU TALK VERY TRULY. I CAN GIVE YOU AN INJECTION NOW.' Near the end of the interview the following occurred:
>
> 'Q. You have a much better chance to play ball (Noise) than if you say you don't remember. If

you tell me that you were in a fit of anger, that you were angry, that you just swung the hammer, but if you tell me that you don't remember, then you will be working against yourself. Where will it get you? A. At that point there, I was so mad. I was like white hot metal. I was so mad. I was never mad at anyone in my life * * * (Noise) * * *

'Q. Do you feel better * * * (Noise) * * * Do you want coffee? A. I drank coffee all night long * * * (Noise) * * * (Noise) * * * (asterisks sic.)' ''

Judge Froessel's comment that, "What happened during these 'Noise' periods, we do not know; why the doctor suddenly asked the defendant after an interruption, 'Do you feel better?', followed by another interruption," is unexplained.

It thus appears without question that Dr. Murphy's opinion was worthless inasmuch as the proof upon the trial does not indicate what took place during these "Noise" periods.

The presumption prevails that the influence of the prior inducement continues and that the subsequent confession is the result of the same influence, which renders the prior confession inadmissible. (*People* v. *Sweetin,* 325 Ill. 245; *People* v. *Kurtz,* 42 Hun (N. Y.) 335, reargument denied 42 Hun 637.)

The trial court instructed the jury that, as a matter of law, Dr. Helfand's efforts resulted in mental coercion (fol. 2678). Dr. Murphy was asked to state his opinion as to whether the mental coercion was carried over during the later confessions to Captain Meenahan, Assistant District Attorneys Andreozzi and Gitlin.

At page 360 of Judge Froessel's opinion on the first appeal he wrote:

> "The doctor was making some progress in breaking down defendant and getting some admissions, knowing that defendant was under 'tension', 'pale', his mouth was 'dry', and despite defendant's frequent 'I can't remember', 'Doc, I'm trying so hard', 'Doctor, I'm exhausted, so please be patient', the doctor kept at him: *'See, I can make you talk very truly. I can give you an injection now.'* " (Our emphasis.)

Dr. Clarence H. Bellinger, a psychiatrist of the highest repute, was appointed by the trial court to be a witness for the petitioner. Dr. Bellinger was praised by Dr. Murphy, the psychiatrist who testified for the district attorney. Before expressing his opinion, Dr. Bellinger examined the petitioner at the jail and spent two hours with him (fols. 1958, 1959).

After hearing what had taken place between Dr. Helfand and the petitioner, Dr. Bellinger testified that, in his opinion, the mental coercion practiced by Dr. Helfand was carried over to Captain Meenahan, Herrschaft and Assistant District Attorneys Andreozzi and Gitlin. Dr. Bellinger stressed the fact that there was no interval or period of respite between the time when Dr. Helfand completed his labors and the time when Captain Meenahan, Herrschaft and Assistant District Attorneys Andreozzi and Gitlin came into the room, immediately following Dr. Helfand's unconscionable and illegal procedure.

In this connection we would point out that the trial judge joined in the examination of both Dr. Bellinger and

Dr. Murphy. Dr. Bellinger was very positive in his opinion that the mental coercion practiced by Dr. Helfand carried over to the subsequent confessions (fols. 2021-2027).

The trial court instructed the jury that, as a matter of law, the Helfand confession was not voluntarily made and that it was due to mental coercion practiced by Dr. Helfand upon the petitioner (fol. 2678). The trial court further instructed the jury that there was a burden upon the district attorney to establish beyond a reasonable doubt that Dr. Helfand, who at the time was acting in behalf of the district attorney, made a promise to the petitioner to induce him to confess and thus did induce him to confess, by reason of such promise of leniency; the said promise being, in fact, that if he made such confession he (the defendant) would not be prosecuted for the capital offense of murder in the first degree (see also trial court's charge at fols. 2681-2683).

As has already been pointed out, the district attorney upon this trial relied solely upon the opinion of Dr. Murphy. We submit that Dr. Murphy's wavering and uncertain testimony falls far short of establishing beyond a reasonable doubt that the confessions were voluntary. We earnestly submit that the life of the petitioner should not be terminated upon the basis of Dr. Murphy's testimony. This we earnestly contend would be a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This Court has held that it was incumbent upon it to "determine independently whether petitioner's confessions were so obtained, by review of the facts upon which the issue necessarily turns" (*Chambers* v. *Florida*, 309 U. S. 227, 229).

Petitioner objected to the introduction into evidence of alleged confessions obtained from him by Dr. Max Helfand, agent of the district attorney, the police and the assistant district attorneys through the use of mental coercion, threats, and promises that if petitioner confessed he would not be prosecuted for murder in the first degree.* Petitioner's testimony given on the first trial was read into the record at the second trial over objection and exception of petitioner, although petitioner did not take the witness stand during the second trial. The trial court overruled these objections and exceptions were duly taken. Petitioner's motion for a new trial in which these errors were specifically pointed out was denied by the trial court (fols. 165-192). Upon appeal to the Court of Appeals of the State of New York these two substantial constitutional questions were raised (see petition, p. 2) and decided adversely to the petitioner by the said Court through affirmance of the conviction by a divided court (see Appendix B of petition).

The material facts concerning the method of obtaining the alleged confessions and the facts concerning the reading to the jury of petitioner's testimony on the first trial, although petitioner did not take the stand on the second trial, are set forth and discussed in the argument herein.

---

* The alleged confession to Dr. Max Helfand, the psychiatrist employed by the District Attorney, was barred by the Court of Appeals after the first trial. Yet the trial judge, Samuel Leibowitz, who presided at the first trial as well as at the second, completely disregarded instructions of the Court of Appeals and permitted this confession to be introduced over petitioner's objection and exception.

Errors Relied Upon

A.

THE COURT ERRED IN AFFIRMING THE CONVICTION OF PETITIONER BASED UPON CONFESSIONS OBTAINED BY MEANS OF MENTAL COERCION, DURESS, THREATS, INTIMIDATION, AND PROMISES OF IMMUNITY FROM PROSECUTION FOR THE CRIME CHARGED IN THE INDICTMENT IF PETITIONER CONFESSED, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

B.

THE COURT ERRED IN AFFIRMING THE CONVICTION BASED UPON PETITIONER'S TESTIMONY READ TO THE JURY FROM THE RECORD UPON THE FIRST TRIAL, WHEN PETITIONER DID NOT TAKE THE WITNESS STAND DURING THE SECOND TRIAL, IN VIOLATION OF ARTICLE FIVE OF THE CONSTITUTION.

Summary of Argument

I.

Where substantial Federal questions have been raised and passed upon in a state court, this Court will make an independent examination of the evidence (*Haley* v. *Ohio*, 322 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Ashcraft* v. *Tennessee*, 322 U. S. 154; *Ward* v. *Texas*, 316 U. S. 547; *Lisenba* v. *California*, 314 U. S. 219; *Brown* v. *Miss.*, 297 U. S. 278.

II.

During all of this period from January 10th until January 14th, petitioner was held by the police without being arraigned or taken before a magistrate until after his alleged confession. The trial court in its charge admitted that this violation of the law had occurred (fol. 2697).

By reference to these undisputed facts, but one conclusion can be reached, namely, that petitioner's conviction herein must be reversed because it was based on confessions obtained through the use of coercion, intimidation, threats and promises of leniency, rendering their character involuntary in violation of rights guaranteed him by the Fourteenth Amendment. The facts and circumstances which were uncontradicted establish that the confessions were not the result of the free choice of the petitioner, but rather flowed from the long gruelling questioning, and without due process, and physical exhaustion brought about by the police, district attorney and the mental coercion, threats, and promises of Dr. Helfand.

The possibility of destruction of the rights of criminal defendants, so carefully protected by a wise judiciary, may well be accomplished by the use of technique such as those employed in this case.

It is submitted that all of the alleged confessions were tainted with the same illegality as the first; all confessions were made on the same night without interruption or pause. Furthermore, the petitioner, who had been without sleep for days, was under the same mental coercion, fear of threats of injection, and promises of immunity to prosecution of murder in the first degree if he confessed, when he made the subsequent confessions, as he was when he made the first one, which was ruled out by the Court of

Appeals in reversing the first conviction. That although the first confession was barred by the Court of Appeals in its first opinion, and although it was conceded by the district attorney to have been obtained by means of mental coercion and notwithstanding the fact that the trial court instructed the jury that it was illegal and must not be considered as evidence of petitioner's guilt, it was admitted in evidence over petitioner's objection and exception. All alleged confessions were made within a period of four hours on the same night.

POINT I

The subsequent confessions were so close in point of time and circumstance to the first, that they should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible.

There was a continuous unbroken incident from the mental coercion, threats, and promises which extorted the first confession to the obtaining of the subsequent confessions.

This Court, always zealous to protect the rights of the poor and downtrodden, had no difficulty in reversing a conviction obtained on a second confession in *Couty* v. *Alabama*, 309 U. S. 629. There the treatment was applied to the prisoner at a police station in Montgomery. He was then carried miles away to Kilby Prison where he made a second confession purporting to be without direct application of force and in the presence of persons not present in Montgomery.

The principle we here invoke is that stated by this Court in the case of *Rochin* v. *California*, 342 U. S. 165:

> "Applying these general considerations to the circumstances of the present case, we are compelled

to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. * * * They are methods too close to the rack and the screw to permit of constitutional differentiation."

* * * * *

"Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."

* * * * *

"Adamson v. California, 332 U. S. 46, 68-123, 91 L. ed. 1903, 1917-1946, 67 S. Ct. 1672, 171 A. L. R. 1223, sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that 'No person * * * shall be compelled in any criminal case to be a witness against himself.' I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. Cf. Boyd v. United States, 116 U. S. 616, 29 L. ed.

746, 6 S. Ct. 524; Conselman v. Hitchcock, 142 U. S. 547, 562, 35 L. ed. 1110, 1113, 12 S. Ct. 195; Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 S. Ct. 183; Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716, 60 S. Ct. 472.

"But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment."

In the case of *Stroble* v. *California*, 343 U. S. 181, it was stated:

"If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict. Malinski v. New York, 324 U. S. 401, 402, 404, 89 L. ed. 1029, 1031, 1032, 65 S. Ct. 781 (1945); Lyons v. Oklahoma, 322 U. S. 596, 597, note 1 88 L. ed. 1481, 1483, 64 S. Ct. 1208 (1944).

* * * * *

"My views on the illegality of confessions obtained between the time of arrest and arraignment are contained in Watts v. Indiana, 338 U. S. 49, 56, 57, 93 L. ed. 1801, 1806, 1807, 69 S. Ct. 1347, 1357; Turner v. Pennsylvania, 338 U. S. 62, 66, 67, 93 L. ed. 1810, 1814, 69 S. Ct. 1352, 1357; Harris v. South Carolina, 338 U. S. 68, 71-73, 93 L. ed. 1815, 1817, 1818, 69 S. Ct. 1354, 1357. The practice of obtaining confessions prior to arraignment breeds the third-degree and the inquisition. As long as it remains

lawful for the police to hold persons incommunicado, coerced confessions will infect criminal trials in violation of the commands of due process of law.

* * * * *

"This confession as well as subsequently obtained confessions were used at the trial. The fact that the later confessions may have been lawfully obtained or used is immaterial. For once an illegal confession infects the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be. Malinski v. New York, 324 U. S. 401, 89 L. ed. 1029, 65 S. Ct. 781."

In the case of *Gallegos* v. *Nebraska,* 342 U. S. 55, it was stated:

* * * * *

"The use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict, remains. Malinski v. New York, 324 U. S. 401, 404, 89 L. ed. 1029, 1032, 65 S. Ct. 781.

"Americans justly complain when their fellow citizens in certain European countries are pounced upon at all by state police, held in jail incommunicado, and later convicted of crime on confessions obtained during such incarceration. Yet in part * * * upon just such a confession, this Court today affirms Nebraska's conviction of a citizen of Mexico who can neither read nor understand English.

"I believe the Constitution forbids the use of confessions obtained by the kind of secret inquisition these deputies conducted.

"There are countries where arbitrary arrests like this, followed by secret imprisonment and systematic questioning until confessions are obtained, are still recognized and permissible legal procedures. See 'The Trap Closes' by Robert A. Vogeler with Leigh White, the Saturday Evening Post, November 3, 1951, pp. 36 et seq."

The principle we here invoke is also stated by this Court in the case of *Watts* v. *Indiana,* 338 U. S. 49, at pages 52 and 53:

* * * * *

"* * * But if force has been applied this court does not leave to local determination whether or not the confession was voluntary. There is torture of the mind as well as body; the will is as much affected by fear as by force. And then comes a point where this Court should not be ignorant as Judges of what we know as men.

* * * * *

"A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police, it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

And as stated in *Haley* v. *Ohio,* 332 U. S. 596:

* * * * *

"If the undisputed evidence suggests that force or coercion was used to exact a confession, we will not permit judgment of conviction to stand, even though there might have been sufficient evidence for submission to the jury. Malinski v. N. Y., 324 U. S. 401.

* * * * *

"Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

* * * * *

"* * * The 14th Amendment prohibits the police from using the private secret custody of either man or child as a device for wringing confessions from them."

In *Lyons* v. *Oklahoma,* 322 U. S. 596, 602, it is stated:

"When conceded facts exist which are irreconcilable with mental freedom, regardless of the contrary conclusions of the triers of the fact, whether judge or jury, this court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

And at page 606:

"Even though approximately 12 hours intervened between the two confessions and even assuming that there was no violence surrounding the second confession, it is inconceivable under these circumstances that the second confession was free from the coercive atmosphere that admittedly impregnated the first one. To conclude that the brutality inflicted at the time of the first confession suddenly lost all its effect in the short space of 12 hours is to close one's

eyes to the realities of human nature. An individual does not that easily forget the type of torture that accompanied petitioner's previous refusal to confess, nor does a person like petitioner, so quickly recover from the gruesome effects of having a pair of human bones placed on his knees in order to force incriminating testimony from him."

It is submitted that the courts should scrutinize subsequent confessions with extraordinary care. Theoretical distinctions and gossamer technicalities should not cut down the great principle that an accused should be free from torture of the mind in order to render a confession admissible. This Court should not permit the constitutional guarantee to an accused to be weakened and diluted by any subterfuge.

The district attorney, an officer of the court and the representative of the law, was a party to this revolting inquisition, for it was the district attorney who personally called Dr. Max Helfand into this case, when the police could not extort a confession after four days of ceaseless interrogation. It was the district attorney, personally, who arranged to have the inquisition room wired, and a loudspeaker and recording device installed on the floor below. It was likewise the district attorney who personally remained on the floor below the inquisition room and listened to Dr. Helfand coerce the petitioner, threaten to give an injection, fraudulently represent himself to be petitioner's doctor, and to promise petitioner leniency if he confessed. It was the district attorney who although listening to this entire illegal and unconscionable procedure, failed to stop it. It was the district attorney who wrote to the Comptroller of the City of New York requesting Dr. Helfand's bill for services be paid. In said letter (Defendant's Ex. A for

Id.) the district attorney stated, "Dr. Helfand was instrumental in obtaining the confession. It is all too clear that petitioner's mind and will had been broken by the technique used by Dr. Helfand. Is it possible that this was done in the hope that the subsequent confessions could be procured more readily? How else to explain the necessity to obtain subsequent confessions.

Improper influence by the police and district attorney, through its duly authorized agent, Dr. Helfand, having been shown, common sense would indicate an exceedingly strong presumption that such influence continued at least for a period of four or five hours without pause during which time all the alleged confessions were made.

POINT II

Without the confessions improperly received in evidence the State has failed to make out a case.

The record is voluminous; many witnesses were paraded by the State before the jury. Yet, when the evidence is examined, it is curious how little the State proved against the petitioner. Indeed the trial court charged the jury at folio 2687:

> "Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted for the reason that the court rules, as a matter of law, that all of the other evidence in the case offered by the prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty."

CONCLUSION

This case presents a flagrant abuse of the fundamental rights of a person accused of crime. The entire evidence of the State is founded upon confessions which followed immediately after "menticide" * had been practiced on petitioner.

Americans justly complain when their fellow citizens in certain European countries are pounced upon at will by state police, held in jail incommunicado, mentally coerced and given truth serum injections, and later convicted of crime on confessions by means of this technique. The technique practiced upon petitioner by Dr. Max Helfand is identical with that used upon Cardinal Mindszenty, Robert A. Vogeler, William Oatis and Michael Shipkov, all of whom confessed to crimes they never committed. The mental coercion practiced upon these poor innocent victims continued, not for four or five hours, as is contended in petitioner's case, but for days and months until each was compelled to admit in open court to his misdeeds.

This petitioner was convicted on a record bare of any evidence against him except alleged confessions. This is a new method to pry a confession out of a defendant and, in our opinion, will always be referred to as the "Menticide case". A new weapon has been added to the torture rack.

In the case at bar the method employed to obtain the confessions is not controverted and the statement itself is beyond dispute, for it is recorded.

---

* See "The Crime of Menticide" by Joost A. M. Meerloo, M.D., New York, published in The American Journal of Psychiatry Vol. 107, No. 8, February 1951. Excerpts in Appendix "C" page 27 of Brief.

Due process of law guaranteed by our State and Federal Constitutions commands that no such practice as revealed by this record shall send an accused to his doom, regardless of the brutality of the crimes with which he is charged.

It is respectfully submitted that the judgment of conviction should be reversed.

HARRY G. ANDERSON,
Counsel for Petitioner.

FREDERICK W. SCHOLEM,
Counsel for Petitioner.

APPENDIX "C"

"THE CRIME OF MENTICIDE"

by

JOOST A. M. MEERLOO, M.D.,
PROF. PSYCHIATRY, COLUMBIA UNIVERSITY, NEW YORK.

(Reprinted from THE AMERICAN JOURNAL OF PSYCHIATRY,
Vol. 107, No. 8, February, 1951)

"The techniques of terror that are paraded as justice by the authoritarian states arose with the development of civilization and were perfected by the Inquisition of the Middle Ages. Side by side with our growing understanding of the human mind has grown the knowledge that this same human mind can be kneaded like putty in the hands of unscrupulous inquisitors. The science of third degree and forcible suggestion develops apace and does not hesitate to draw on modern medical techniques and new findings from the fields of psychiatry and psychology to accomplish its ends.

Such an organized system of psychological intervention and judicial perversion, in which a powerful tyrant synthetically injects his own thoughts and words into the minds and mouths of the victims he plans to destroy by mock trial, may well be called menticide.

Menticide is a growing threat to mankind—a threat far worse than genocide.

Menticide is an attack on man's very mind, on his sovereign will and conviction. It destroys free thought and makes servile, mechanical instruments of his inviolate thought processes. In the hands of dictators and secret police, menticide is more deadly than lethal weapons, yet

it is still unrecognized as an official institution for the suppression of political opposition.

Imprisonment and repeated interrogation alone can tax human resistance. When physical torture is added the urge to confess 'according to prescription' is easily aroused. But even physical torture and third degree methods are not enough to extort confessions from the strong minds of spiritual leaders who have always lived by their convictions.

For these victims who symbolize opposition elements of the population, crude torture is often inadvisable, since physical abuse arouses mass indignation. More perverted techniques are needed that will evoke both public confession of conspiracy against the regime and a declaration of 'Conversion' to its idealogy. These gratifying results are achieved by mental torture and drugs.

In his expose on Cardinal Mindszenty's imprisonment, 'The Cardinal's Story,' Stephen K. Swift graphically describes three typical phases in the psychological 'processing' of political prisoners. The first phase is directed toward extorting confession. The victim is bombarded with questions for days and nights. He is inadequately and irregularly fed. He is allowed almost no rest and remains in the interrogation chamber for hours on end while his modern inquisitors take turns with him. Hungry, exhausted, his eyes blurred and aching under unshaded lamps, the prisoner becomes little more than a hounded animal.

To the horrors the victim suffers from without must be added the horror from within. He is pursued by the unsteadiness of his own mind which cannot always produce the same answer to a repeated question. As a human being with a conscience he is pursued by the hidden guilt feelings that undermine his rational awareness of innocence.

Appendix "C"

As a social being he is pursued by a need for companionship; as a private individual he is blackmailed by an inner need to be left alone and undisturbed, if only for a few moments.

Much as an animal is conditioned to perform tricks, the second phase of processing trains the victim to accept his own confession. False admissions are reread, repeated, hammered into his brain. He is forced to reproduce fantasied offenses, fictitious details that ultimately convince him of his criminal status. In the first stage he is hypnotized by others. In the second stage he is in a state of autohypnosis, convincing himself of fabricated crimes.

In the third and final phase, the victim, now completely conditioned and accepting his own guilt, is trained to bear false witness against himself and others.

Psychological attacks involving planned mental torture are, however, more than the human being can withstand. Menticide changes normal human wishes into pathological cravings.

The prisoner, equally dependent, is reduced psychologically to the status of the helpless infant. Ideals, standards, civilized concepts lose their significance under the stress of mental and physical torture, and all that remain are the primitive requirements to sustain life—sufficient food and sleep. Thus, at some point, capitulation in the form of false confession, rather than continued resistance, serves the need for infantile self-preservation.

The concept of 'menticide' indicates an organized system of judicial perversion and psychological intervention, in which a powerful tyrant transfers his own thoughts and words into the minds and mouths of the victims he plans to destroy or to use for his own propaganda. Modern psychiatry may deliver him several tools for this perversion."

APPENDIX "D"

OFFICE OF THE
DISTRICT ATTORNEY
OF KINGS COUNTY

MILES F. McDONALD
DISTRICT ATTORNEY

January 16, 1951

Mr. Edward Smith
Chief Auditor
Comptroller's Office
Municipal Building
New York City, New York

Dear Mr. Smith:

This letter is in reply to your recent inquiry by telephone concerning the bill of Doctor Max Helfand, submitted for his services rendered in the preparation of trial of the murder case of the People against Camilo Leyra.

The conferences set forth in Doctor Helfand's bill were held and were necessary in each instance as Doctor Helfand was instrumental in obtaining the defendant's confession.

In addition, Doctor Helfand was charged by the defense with hypnotising the defendant. Under the circumstances many lengthy conferences were held with the doctor.

Very truly yours,

MILES F. McDONALD
District Attorney
By /s/ John E. Cone
Assistant District Attorney

JEC/pl

Defendant's Exhibit "A" for identification

APPENDIX "E"

In the case of *Rex* v. *Booker*, 4 Dom. Law Rep. 795 (Alberta Supreme Court) an application was made by the Crown to admit a confession, in excluding the confession the Court stated at page 795:

> " * * * The Crown must establish it was a voluntary confession, all the facts bearing upon the issue must be considered carefully. * * *
>
> The Crown has employed as its agent Dr. Langsner, a man who calls himself a criminalogist and who claims to be able to obtain information by means which are not used by the ordinary individual. He says he can exercise hypnotic effects upon a subject by feeling the thoughts of the subject. Dr. Pope, Professor of Medicine in the University of Alberta, who gave evidence as to the influence of hypnotic power alleges that the effects of its exercise upon a subject may remain with the subject, and that the effect may still exist in the subject (p. 796): although not apparent to the ordinary observer and that the general effect upon the subject is to weaken his mental control.
>
> Dr. Langsner was present at the preliminary inquiry at Mannville as an ordinary spectator and had no interview or contact with the defendant then. The defendant was brought to the guard-room at Edmonton and the next day he was visited by Dr. Langsner in the guard-room at Edmonton. Dr. Langsner says he had no conversation with the defendant. He says his purpose was to obtain evidence as to the location of a rifle which had been used to cause the death of four persons for whose death the defendant is now being tried. The day following his

visits to the defendant at the guard-room he went to the scene of the murder accompanied by Sgt. Leslie and in a search of less than half hour by detective and himself a rifle was found in the wooded land near the scene of the murder, of the calibre of that used for shooting down the four persons.

Dr. Langsner made subsequent visits to the defendant in the guard-room and alleges there was no conversation with the defendant. His visits were admittedly for the purpose of obtaining a confession from the defendant. On the last visit Dr. Langsner informed the officers in charge they might expect a confession in a short time. In a few minutes the defendant informed the officer in charge he wanted to see Detective Leslie. Detective Leslie came in,—defendant then made the confession.

Under the circumstances, I am of the opinion that the Crown should clearly establish that the defendant's mentality was not affected by Dr. Langsner's visits. Dr. Langsner says he did not hypnotize the defendant and he seemed to be quite normal when Detective Leslie visited him. The evidence of Dr. Pope supports the hypothesis that although the defendant appeared to Detective Leslie to be normal yet the effects of hypnotism might still be present. Langsner's denial of hynotism (p. 979) must be viewed with suspicion in view of the admission that he obtained information as to the location of the rifle by feeling the defendant's thoughts and in view of the admission he can practice mesmerism and also his admission that his visits were for the purpose of obtaining a confession.

Appendix "E"

If the confession had been made to Detective Leslie under normal ordinary condition, I would have no hesitation of admitting it, but the fact that Langsner announced that the confession might be expected, that his announcement was followed by a desire to see Detective Leslie, and the time elapsing between those events being so short, raises in my mind a doubt as to the bona fide of the method used by Dr. Langsner during his visits with the accused.

In my opinion then the Crown has failed to discharge the onus that I have placed upon it of establishing that the defendant was not under the influence of mental suggestion exercised by Dr. Langsner and there I will not admit the confession. Application dismissed."

See also

People v. *Robinson,* 19 Cal. 40;
State v. *Strong,* 83 N. J. R. 177;
State v. *Exum,* 138 N. C. 599;
Louis v. *State,* 24 Ala. App. 120, 138 So. 904
Hypnotic Influence in Criminal Cases by H. M. Bannister, M.D., 51 Albany Law Journal 87.

APPENDIX "F"

A leading authority on mental coercion, Dr. August Forel, Professor of Psychiatry and Director of the Provina Asylum, Zurich, Switzerland, stated in his work entitled, HYPNOTISM OR SUGGESTION AND PSYCHOTHERAPY, at pages 282 and 292:

> "Just as one can wring a confession out of a child, a woman, or a weak man, of a suspicious deed by the power of skillful persuasion, so one can suddenly produce the suggestion in an innocent person that he is guilty. When this takes place, not only a complete confession of the crime, which he has not committed is made, but all sorts of details of the most concrete kind, as we have seen, are also hallucinated retroactively."
>
> "They are, for all intents and purposes, in the same condition for the moment as if they were drugged, or deeply idiotic, or even apparently dead."

In HYPNOTISM TODAY by Dr. Jean Bordeaux and Dr. Leslie M. Lecron, published by Gruene and Stratton, at pages 30, 31, 32 and 33 it is stated:

> "Fixation of the gaze on the eye of the operator offers some advantages and is a preferred method with us on healthy subjects, for we believe that quicker results follow. Hull agrees with this preference. Some suggestion is involved, for most subjects think the operator's fixed stare produces sleep. Personally we prefer to explain that it is only for attention.
>
> With this system, the operator should bring his own eyes within eight inches of those of the subject."

Appendix "F"

"Sensory fatigue is always an aid in bringing on hypnosis. A tired person is far more susceptible than one who is wide awake, and fatiguing the eyes by concentrating the gaze is a definite part of induction methodology."

Technique Developed By Braid-Bernheim:

"It is the eye—the most occult organ of all, on the supervicies of our body—which, by serving as a medium between that bit of metal or crystal and the brain, attunes the molecular vibrations of the nervous centers of the latter into unison (example equality in the number of their respective oscillators with the vibration of the bright object held. And, it is this unison which produces the hypnotic state. It is the eye—the chief agent of the will of the active operator."

Dr. J. Luys:—La Charite Hospital of Paris:

"Under hypnosis—the individual no longer belongs to himself; he is surrendered, an invert being."

" * * * a woman may become a mother without any trace existing of a criminal assault without the patient having the smallest recollection of what had passed after she had awakened."

"Sometimes, in the active condition, the state of lucid somnambulism, and even in the condition of simple fascination, the subject may be exposed to the influence of suggestions of the most varied kind on the part of the person directing his actions. He may be induced to become a homicide, an incendiary, or suicide, and all these impulses deposited in his brain during sleep become forces stored up, which will burst forth at a given moment."

Appendix "F"

Dr. H. H. Hart: Columbia University—Director of Neurological Clinic of the Vanderbilt Institute—

Points out that "hypnotism tends to increase suggestibility and that those who possess this feature (suggestibility) most abundantly are just as prone to accept unfavorable as favorable suggestion—if they are not controlled by constructive suggestion and the authority of the physician, they are just as apt to fall prey to destructive suggestion." (Journal of Nervous Mental Diseases, Nov. 1931.)

George Trumbull Ladd—11 Yale Law Journal 173, read before N. Y. Bar Ass'n, at page 176:

> "One of the most marked characteristics of the hypnotic state is what I will venture to call the process of 'decentralization' which goes on; that is to say physiologically considered, the higher cerebral centres lose their place of command; considered from the point of view of the conscious mental life, the person suffers a loss of the power of rational self-control. In a word, the hypnotized subject is in a condition of preparation to become the 'tool' of another—for evil as well as also for good."

At page 179:

> "It is undoubtedly theoretically possible to induce hypnotized subjects to falsify testimony against themselves, or against others, to persuade themselves that they remember committing crimes which they never committed, etc."

Appendix "F"

At page 188:

"Of course, the legal practice under English and American Law would not allow evidence obtained in this way, from the accused against himself, to be used for his conviction, however highly probable it might be that the evidence was a sufficient proof of the facts. For there is a very great danger that the patient will, by suggestion, falsify his own memory and sincerely but falsely accuse himself. In this connection we are reminded of the numerous cases of children or even of adults who have been urged into the confession of crimes which they never committed."

APPENDIX "G"

"BREAKDOWN"

THE STORY OF MICHAEL SHIPKOV IN THE HANDS OF THE SECRET POLICE.

Telling how the Communist secret police are able to pry confessions of treason out of men and women who love their country.

Page 5.

For the first time a man "broken" by the Communist police and made to sign one of the "confessions" with which we have become tragically familiar has had the spiritual fortitude to piece together again the shattered remnants of his personality and reveal in detail how the "confession" was extracted. The man is Michael Shipkov, a Bulgarian, a member of the staff of the American Legation in the Bulgarian capital, Sofia.

Page 18.

The interrogation took on again, unrelaxed. Here I want to describe their method of interrogation; you are a spy and a traitor, tell us what tasks you were given to do, who gave them to you, in what manner and with whose help you achieved them and to whom and in what manner did you report. No further indication and no generalities, no overall statements of guilt accepted. And this went on, hour after hour, throughout the night, throughout the day, without respite or end.

Page 22.

Out of the jumbled memories, some impressions stand out vivid. One: they are not over interested in what you

tell them. It would appear that the ultimate purpose of this treatment is to break you down completely, and deprive you of any willpower or private thought or self esteem, which they achieve remarkably quickly. And they seem to pursue a classic confession, well rounded off in the phraseology, explaining why you were induced by environment and education to enter the service of the enemies of Communism, how you placed your capacities in their service, what ultimate goal did you pursue—the overthrow of the people's government through foreign intervention. And they appear to place importance on the parallel appearance of repentance and self-condemnation that come up with the breaking down of their prisoner.

Page 23.

I wrote six lined pages, beginning with my unfortunate origin and education, my formation into a class enemy, then a description of my espionage with stress on each individual task—who had entrusted me with it, when, how I had achieved it, whom I had enrolled to help, how I had handed in my report. At the end, a plain statement of the purpose I had been pursuing—the destruction of the regime through foreign intervention. Signature after that—and although my deposition was controlled and checked paragraph by paragraph by the two lesser persons on duty, one of the superiors insisted that I add specific information as to my secret preference for the British and on my spying for them on the Americans.

Page 26.

However, with the first acceptance, my power of resistance grew weaker and I slipped steadily lower and lower, not only drawing punishment, but time and time again

speaking of others, friends and relatives of mine, involving them in deeds or thoughts utterly untrue, unfounded, slanderous. And then the feeling of resistance is wholly broken; and I remember going deeper and deeper in this awful disloyalty, feeling utterly degraded and wretched, and yet powerless to protest and deny. * * * At the end, when I wrote down the confession of guilt and repentance, I remember that the whole thing appeared fantastic and ridiculous but it seemed to give them complete satisfaction.

Page 27.

* * * and possible others, involving any or all of them in subversive espionage or other punishable acts is false, untrue, and dragged out of me against my will, against any knowledge of actual truth, under duress. * * * I also want to testify that all the admissions of guilt forced from me by the militia involving espionage or subversive activity of my employers of the British Mission or later the American Legation, requested of me by these institutions or by any of their officers, and executed by me, as the militia has made me indicate, are false, untrue, imaginary and preposterous and have no foundation whatever.

Page 29.

I recall some other details that might throw further light on this experience of mine, I believe I explained that the endless interrogation seemed to be intended (a) as breaking down resistance and paralyzing independent thought, and (b) as adapting the "confessions" obtained to their pattern. And whatever did not fit that pattern was brushed aside, and the subject was maintained until at the end some incredible story would seem to fit and satisfy them.

Appendix "G"

LIFE MAGAZINE—JUNE 20th, 1949

"WHY THEY CONFESS"

The hammering was done by the Soviet secret police, then known as the NKVD. Their "processing" had the desired effect on Fritzsche, who was broken to do what was wanted—without even being beaten or drugged.

Surprising as it sounds, a prisoner of the NKVD has rights, and his supreme right is to give the right answer. It is hammered into him that in the last instance his fate is in his own hands.

Weakened by hunger, exhausted by lack of sleep, hypnotically confused by the always glaring light and numbed by loneliness, Fritzsche was nearing a nervous breakdown, perhaps insanity.

Not that he had already made up his mind to "confess". But he had come to the point of facing the problem. And still he had suffered no beatings. He asserts that he never even heard of any. This is certainly a high tribute to the suggestive powers of a scientific horror treatment.

No "Gestapo methods" had been applied, no hypnotism, no drugs. This is one of the several explanations Fritzsche later gave for his collapse: "Western psychologists don't see the simple fact that hope is stronger than fear. Therefore hope is more willing to make concessions."

Office - Supreme Court, U
FILED
FEB 27 1953
HAROLD B. WILLEY, C

NO. 331 MISC.

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILES F. McDONALD
District Attorney
Kings County
New York

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

INDEX

PAGE

STATEMENT 1

QUESTIONS PRESENTED 2

RECORD FACTS 3

JURISDICTION 33

ARGUMENT 35

CONCLUSION 60

THE PETITION SHOULD BE DENIED 60

APPENDIX 61

CASES CITED

Adams v. New York, 192 U. S. 585, 597, 598 57

Adamson v. California, 332 U. S. 46, 91 L. Ed. 1803.. 42, 57, 58

Ashcraft v. Tennessee, 322 U. S. 143, 153 2

Bess v. Com., 118 Ky., 858 59

Bramn v. U. S., 168 U. S. 569; 42 L. Ed. 530 43

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682 .. 42

Cadys v. State, 198 Ga. 99 59

Canty v. Alabama, 309 U. S. 628, 84 L. Ed. 988 42

Chambers v. Florida, 309 U. S. 228, 84 L. Ed. 716 .. 42

Com. v. Brown, 66 Pa. Super., 519 59

Com. v. Reynolds, 122 Mass. 454 59

Fertig v. State, 100 Wis. 301 59

Gallegos v. Nebraska, 342 U. S. 46, 91 L. Ed. 1903.. 42, 55

Haley v. Ohio, 332 U. S. 596, 92 L. Ed. 224 ..... 5, 42

Harris v. South Carolina, 338 U. S. 68, 93 L. Ed. 1815 42

Haywood v. U. S., 268 Fed. 795 57

Heller v. U. S., 57 Fed. 2d, 627; cert. denied 286 U. S. 567 59

Henze v. State, 154 Md. 332 59

PAGE

Indian Fred v. State, 35 Arizona 48 59

Lee v. Mississippi, 332 U. S. 742, 92 L. Ed. 330 ..... 26, 37
Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166 .. 39,42, 44, 55
Lomax v. Texas, 313 U. S. 544; 85 L. Ed. 1511 42
Lyons v. Oklahoma, 322 U. S. 596, 88 L. Ed. 1481 ...6, 7, 42, 44, 48, 51, 53, 55

Mackmasters v. State, 83 Miss. 1 59
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819 ..... 43, 44
Malinski v. New York, 324 U. S. 400, 89 L. Ed. 1029 .....42, 43, 52
Miller v People, 216 Ill. 309 59

People v. Borowsky, 258 N. Y. 371 51
People v. Boyd, 67 Cal. Appeals 292 59
People v. Defore, 242 N. Y. 13 57
People v. Egnor, 175 N. Y. 419, 424 56
People v. Feldman, 299 N. Y. 153 59
People v. Sherwood, 271 N. Y. 427 56
People v. Sweetin, 325 Ill. 255 56
Pierre v. Louisiana, 306 U. S. 354, 83 L. Ed. 307 43
Powers v. U. S., 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448 59

Raffele v. U. S., 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054 59
Rafferty v. State, 91 Tenn. 655 59
Rochin v. California, 342 U. S. 165, 96 L. Ed. 183 ... 43
Rodriguez v. State, 130 Tex. Crim. 438 59

Scherpig v. State, 112 Tex. Crim. 61 59
State v. Duffy, 57 Conn. 525 59
State v. Farrell, 223 N. C. 804 59
State v. Flynn, 35 N. H. 64 57
State v. Kimes, 152 Iowa 240 59
State v. King, 102 Kan. 155 59
State v. McPherson, 77 Or. 151 59

PAGE

State v. Newman, 127 Minn. 445 59
State v. Rogers, 56 Kan. 362 59
State v. Speyer, 207 Mo. 540 59
State v. Tellay, 100 Utah 25 59
State v. Wright, 38 N. M. 427 59
Stroble v. California, 343 U. S. 181, 96 L. Ed. 872 .. 42, 44, 51, 52, 54, 56

Turner v. Pennsylvania, 338 U. S. 62, 93 L. Ed. 1810 42

U. S. v. Carnigan, 342 U. S. 36, 96 L. Ed. 48 43
U. S. v. Heller, 57 Fed. 2nd 627; cert. denied 286 U. S. 567 59

Vaught v. U. S., 7 F. (2d) 370 (C. C. A. 9) 59
Vernon v. Alabama, 313 U. S. 547, 85 L. Ed. 1513 42

Ward v. Texas, 316 U. S. 546, 86 L. Ed. 1663 42
Warde v. U. S., 158 Fed. 2d 651 59
Watts v. Indiana, 338 U. S. 49, 93 L. Ed. 1801 ..16, 21, 42, 53
White v. Texas, 310 U. S. 530, 84 L. Ed. 1343 42

OTHER CITATIONS

Code of Criminal Procedure, Section 395 41

Judicial Code—Section 237-b as amended, 28 U. S. C. A. 344-b 33

New York State Constitution, Art. 1, Section 6 41

2 Wharton Crim. Ev., 11th Ed., Section 601 56

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a review of the judgment of the County Court of Kings County, convicting him of the crime of murder in the first degree for the killing of his father, Camilo Weston Leyra, Sr. On appeal to the Court of Appeals, the highest court of the state, the judgment of conviction was affirmed by a divided court. Majority and dissenting opinions are reported in 304 N. Y. 468.

The trial here involved was the second trial of an indictment charging petitioner in two counts, with the murder of his father and mother. He was first convicted of murder in the first degree on both counts and was separately sentenced to death with respect to each conviction. The judg-

ments were unanimously reversed by the Court of Appeals, with an opinion reported in 303 N. Y. 353.

In addition to the judgment to which this petition is addressed, petitioner was convicted of murder in the second degree for the killing of his mother, Catharine. That judgment is now on a pending appeal in the Appellate Division of the Supreme Court, Second Judicial Department.

On November 19th, 1952, Hon. Charles Froessel, a Judge of the Court of Appeals, granted a stay of execution with respect to the judgment of conviction for murder in the first degree.

Questions Presented

Petitioner contends:

1. The court erred in affirming the conviction of petitioner based upon confessions obtained by means of mental coercion, duress, threats, intimidation and promises of immunity from prosecution for the crime charged in the indictment if petitioner confessed, in violation of the due process clause of the Fourteenth Amendment;

2. The court erred in affirming the conviction based upon petitioner's testimony read to the jury from the record upon the first trial, when petitioner did not take the witness stand during the second trial, in violation of Article V of the Constitution;

3. The subsequent confessions were so close in point of time and circumstances to the first, that they should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible;

4. Without the confessions improperly received in evidence, the state has failed to make out a case.

RECORD FACTS MATERIAL TO THE QUESTIONS PRESENTED

General Outline of Case

The case against petitioner and the issues presented by the instant petition can be put in proper prospective only by reference to the records of both trials. Necessary also, is a statement of the treatment by the Court of Appeals of the facts presented in the first record and of the errors committed on the first trial. Only thus can the curative aspects of the second trial be understood.

On Tuesday, January 10, 1950, petitioner's father and mother were found in their apartment, brutally beaten to death by multiple blows upon the head. The bodies were discovered by petitioner, his business partner, Herrschaft, and a cousin, Valdez.

Fratricide and matricide are the most horrible crimes upon the index of human evil, yet each finds a place in the records of crime. But a combination of both is, at least within the knowledge of the present writer, unknown in the history of the law. Nevertheless, suspicion soon centered upon petitioner as the unnatural killer.

There was ample reason to suspect him. The most cursory investigation soon disclosed (1) that petitioner had lied concerning the disappearance of clothing which he customarily wore but which he denied having worn on the visit of discovery of his parents' bodies; (2) that he had sought to turn the attention of the police to unknown persons in a deteriorating neighborhood as the perpetrators of the crime; (3) that although he was married and the father of three children from whom he lived apart, and despite his

straitened financial circumstances, he maintained a paramour in a separate menage; (4) that he had given a demonstrably false alibi as to his whereabouts on the morning of the murders. (He told the police that he had visited his wife in her New Jersey home on the occasion of her birthday when all of the circumstances pointed strongly to the falsity of this statement); (5) he had lied concerning the purchase of a suit of clothes and a pair of shoes, obviously in order to hide his disposition of the bloodstained apparel which he had worn at the time of the killing; (6) the story of the purchase of a raincoat on the street from a peddler in the early morning hours of Tuesday, January 10th (submitted to account for the disappearance of his usually worn overcoat) was on its face incredible; (7) the records of the telephone company proved the falsity of his alibi for the morning of Tuesday, January tenth, in that he had claimed to have spoken to telephone-book distributors upon leaving his New York City apartment at ten o'clock in the morning when, in fact, the books were left at the door because of his absence, and that of his paramour, from the apartment.

Despite these well-founded suspicions entertained by the police, petitioner was permitted his liberty during Tuesday night, Wednesday and Thursday. True, he was questioned steadily from Thursday afternoon, January 12th, and through the early hours of the following morning. It is pertinent and important to note, however, that this questioning was done entirely by one man, Captain Meenahan of the New York City police force. There were no "relays of officers, experienced investigators, and highly trained lawyers" who subjected him to inquisitorial interrogation to the point where not only he but they were exhausted (*Ash-*

craft v. *Tennessee,* 322 U. S. 143, 153; *Haley* v. *State,* 68 S. Ct. 302). Moreover, even though at this time petitioner for the first time admitted his presence in his parents' apartment on the murder morning of Tuesday, January 10th—a presence which he had before consistently denied —he was, nevertheless, permitted to attend his parents' funerals on the morning of Friday, January 13th, and thereafter was taken to the Hotel St. George for refreshment via a haircut and shave and sleep.

Petitioner was next in the company of Dr. Max Helfand, a distinguished psychiatrist, teacher of neurology and psychiatry, hosiptal director, diplomate of the American Boards of Neurology and Psychiatry and author on those topics. Doctor Helfand spoke to petitioner for a while. When he left, Captain Meenahan rejoined petitioner and received from him a full oral confession.

It was the contact between Doctor Helfand and petitioner and the confession made by the latter to the doctor, as received in evidence at the first trial under instructions ruled by the Court of Appeals to be error, which was the cause of the reversal by that Court of the first judgments of conviction.

Petitioner quotes extensively from the record of the first trial, giving examples of conversations between himself and Helfand (Petition for Writ of Certiorari, pp. 14-20). We do not argue the nature of this contact and the effect thereof upon petitioner, nor its effect in law upon the course of the first trial. Clearly, and beyond possibility of minimization, the Court of Appeals thus characterized the episode:

> "Bearing in mind the undisputed setting in which this interview was arranged and recorded, while

defendant was in custody of the police; defendant's physical and mental condition at the time, already alluded to; the psychiatrist, calling himself defendant's doctor, playing upon the latter's natural fears and hopes, pressing his hands upon defendant's head with accompanying commands, and suggesting details to an unwilling mind by persistent and unceasing questioning; informing defendant that he was not morally responsible; making deceptive offers of friendship and numerous promises, express and implied; giving assurances in a pseudo-confidential atmosphere of physician and patient; and all the attendant circumstances taken together—this interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here."

The court then ruled *why* the reception of this evidence was reversible error:

"Whether the coercion, which we find implicit in defendant's statement to the doctor, extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remains a question of fact for the jury, and this question was never properly submitted to them. *These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions. Only thus would due process of law be accorded defendant.* (*Lyons* v. *Oklahoma, supra.*)" (Italics ours.)

In another aspect of the case, the Court also held that a promise of immunity by Doctor Helfand (conveyed in

the words "These people are going to throw the book at you unless that you can show that in a fit of temper you got so angry that you did it. Otherwise they toos (toss) premeditation in and its premeditation", and more than once repeated in other language), had been improperly submitted to the jury in that the jury had not been instructed "to consider separately the later confessions, in the light of any promise that may have been made during defendant's statement to the doctor (*Lyons* v. *Oklahoma, supra*)".

We discuss the entire question of the later confessions and the trial court's treatment thereof in subsequent portions of this brief. However, it is here pertinent to state, and important to note, that one of petitioner's major defenses, which the jury rejected, *i.e.*, that he had been hypnotized by Doctor Helfand into making the confession, was in turn rejected by the Court of Appeals in these words:

> "Since the issue of hypnotism was one of fact concerned largely with the credibility of defendant as against that of the doctor, and that issue was quite fully and impartially presented to the jury, there is no reason why we should now interfere with that finding."

This opinion, per Froessel, *J.* spoke unanimously for the entire Court. It was a direction to the People that, upon the retrial of the case, petitioner's statement to Doctor Helfand should be submitted to the jury with instructions of a fourfold kind: first, that the jury could in no event consider petitioner's confession to the doctor as evidence of guilt; second, that the jury were to consider the entire episode only in relation to the subsequent confessions to Captain Meenahan, Herrschaft and the assistant district

attorney; third, that if the jury found that any of these confessions were induced, obtained or affected by either the mental coercion or the promise of immunity, they must reject that confession as being not truly voluntary; and, fourth, that if for any of these reasons they rejected all these confessions they must acquit petitioner because, as Judge Froessel wrote:

> "The verdict rests largely upon alleged confessions of defendant."

The Second Trial

Petitioner was thereupon retried. It is now pertinent to give in greater detail the testimony submitted to the jury on that second trial.

The fact of death, by reason of fractures of the skulls and lacerations of the brains of both parents, was sufficiently established by medical testimony.

William Herrschaft, who was both an employee of the senior Leyra and petitioner's partner in a different business (located also in the father's shop), testified that on the morning of Tuesday, January 10, 1950, the father neither came to the business office nor telephoned an explanation of his absence. Likewise petitioner, who was himself employed by his father, did not appear but telephoned in explanation of his absence that he was going to New Jersey to see his wife, whose birthday it was. When, later in the day, the father still had not come to the office, Herrschaft and petitioner, accompanied by Manuel Valdez, the latter's cousin, went to the parents' Brooklyn home. Petitioner was then wearing a tan raincoat which Herr-

schaft had never before seen. He did not wear an overcoat.

The bodies were there discovered. Herrschaft did not meet petitioner again until Thursday, January 12th, at which time, *before any accusation had been made,* petitioner told Herrschaft that "he thought the police had him as No. 1 suspect". In the meanwhile, as Herrschaft told petitioner, he had been interrogated by the police about petitioner's overcoat. The latter answered that he had lost the garment on January 10th *after* the visit to his parents' home; that he had worn the overcoat to Brooklyn. Herrschaft, however, remembered that he had worn the raincoat, and not the overcoat. When they consulted Valdez and a neighbor of the parents, Mrs. Gorman, both agreed with Herrschaft. Also, they testified to such agreement.

Lee Adamski, appellant's paramour, left him in their Manhattan apartment on the morning of Tuesday, January 10th at 7 o'clock in the morning, when she went to her place of employment. They next met at 11:30 that evening. When she noted that he was wearing a raincoat which she had never before seen, she asked what had happened to his overcoat. His answer was that he must have left the overcoat on the subway and had, therefore, purchased a raincoat. She also noticed that he was wearing a new suit. She never again saw the one which he had previously been in the habit of wearing.

Police Captain John J. Meenahan testified that when he first met petitioner in the late afternoon of Tuesday, January 10th, petitioner wore a raincoat. They met again on Wednesday. Meenahan learned of petitioner's family, and also of his relations with Lee Adamski. Meenahan

questioned him concerning his overcoat and was falsely told that it was at petitioner's office. A search of the office of course failed to disclose the garment.

When the captain questioned him concerning the raincoat, petitioner's answer was a classic of desperate improvisation. In addition to his employment by his father and his business partnership with Herrschaft, he also worked as a bartender in the Greenwich Village section of New York. At about four o'clock in the morning of Tuesday, January 10th, when he had quit his work there, he purchased a raincoat from a peddler on the street. As he said: "Yes; that is the custom over there—there is always peddlers around at 4 A.M." When the captain asked him about the new suit which Miss Adamski had seen him wearing Tuesday evening, he stated that he had bought it on the previous Saturday, January 7th, at the well-known Klein's store and that he had had cuffs put on. He also told the captain that he had bought new shoes at a 42nd Street Army and Navy store. Both these statements were conclusively proved to be false.

In an endeavor to strengthen his alibi, based on his alleged New Jersey birthday visit to his wife on the morning of Tuesday, January 10th, petitioner claimed to have been in his New York apartment until at least ten o'clock in the morning, at which time he answered a doorbell ring and received a new telephone book from the company's representative. This, too, was shown to have been false (by testimony of Hassett that because there was no response to his ring, he had left the book at petitioner's apartment door).

On Wednesday, January 11th, Meenahan and petitioner again spoke until about midnight. Petitioner freely left

and did not meet the captain until the next afternoon about two o'clock.

About seven thirty that evening, January 12th, Meenahan charged petitioner with his false alibi and the lies about the purchase of the suit and shoes.

The knowledge that his prevarications were of no avail finally caused petitioner to make the beginning of an approach to the truth. For the first time, he disclosed that there had been bitter arguments between himself and his father concerning the latter's business and that the father had charged him with "putting him out of business". Later, at three o'clock in the morning, petitioner for the first time admitted his presence in the apartment which he had to this point consistently denied. We stress—we properly stress—the fact that this admission preceded by almost a whole day Doctor Helfand's contact with him and contradicted his statement to the police that he had first come to the apartment on the afternoon of Tuesday, January 10th, there to discover the killings.

Meenahan was followed on the stand by Doctor Helfand. The conditions under which his testimony was received are even more important in the consideration of the petition now before the Court than that testimony. We describe them best in the words of the trial judge:

> "The Court: In other words, none of the testimony offered by this witness will be considered by the jury on the question of the guilt or innocence of this defendant."
>
> • • • • •
>
> "The Court: The point I make is this. Let us be clear about it. If this witness testified to any incriminating statements made by this defendant, I

> want to say at the outset that the jury must not in any wise, shape, form or manner consider such statement as indicating any guilt on the part of this defendant."
>
> * * * * *
>
> "The Court: Yes; in that you are quite right. But what he says by way of incrimination is not to be considered as evidence of guilt against this defendant. That is right—that is as clear as I can make it. I will say it again and emphasize it. The testimony of this witness, if it indicates any statements made by this defendant, which tend to incriminate, must be disregarded in that respect. It is not received for that purpose."
>
> * * * * *
>
> "The Court: Is there anything you care to add by way of comment or explanation so that the record may be as clear as crystal? I think I have covered it."

These statements by the court were agreed to by petitioner's counsel:

> "Mr. Healy: I think you have covered it."

The Court then said:

> "The Court: I shall say it again in the charge when we submit the case to the jury."

As we shall hereafter demonstrate, the court did amply and clearly charge the jury to the same effect.

The colloquy to which we have just referred took place in the presence of the jury. The combination of these clarifying statements, made just prior to Doctor Helfand's testimony, with the ultimate charge, which were almost the

last words heard by the jury prior to their deliberations, leaves no doubt that the sole function of Helfand's testimony was that it should be a measuring rod for the assessment of the voluntary or involuntary nature of the subsequent confessions to Meenahan, Herrschaft and the District Attorney.

It was understood on all sides that Doctor Helfand's examination was in the nature of a *voir dire* only, and as a preliminary to the introduction of these subsequent confessions. The sole purpose in calling Helfand was *for the benefit of petitioner* and in order to enable him, upon the basis of the "mental coercion" practiced upon him by the doctor, to urge the invalidity of the subsequent confessions. In a word, Doctor Helfand was in form only a witness for the People. In reality he was a witness for the defense and appeared on the stand by prearrangement among the court, the People and the defense in obedience to the direction of the Court of Appeals which, we submit, was explicit in Judge Froessel's language:

> "Whether the coercion which we find implicit in defendant's statement to the doctor extended over and into the later confessions to Meenahan, Herrschaft and the assistant district attorneys remains a fact for determination by the jury and this question was never properly submitted to them. These confessions should have been separately considered in the light of the coercion existing at the time of defendant's statement to the psychiatrist, and only if the jury were satisfied beyond a reasonable doubt that such coercion had ceased to influence defendant could they consider the later confessions."

The course of Helfand's examination makes it impossible to doubt his function on the stand. The prosecutor did

no more than put to Helfand a few questions designed to elicit his professional background and the fact that he had met petitioner through the introduction of Captain Meenahan and by arrangement with the District Attorney of Kings County. It was under cross-examination by defense counsel that Helfand recounted his practices upon petitioner and thus gave to the jury in full detail a picture of the incident which the Court of Appeals characterized as "ceaseless pressure", "torturing of the mind" and "mental coercion". When, therefore, the jury came later to scrutinize the subsequent confessions, they were to do so within the framework of the antecedent history.

Nor was the cross-examination which they heard in any sense a prefunctory one. Scrutiny of the record will disclose that defense counsel wrung from the matter every drop of value to their client including Helfand's urgence that petitioner confess the crime; his promise to help him; his manipulation of petitioner's forehead in order "to bring back all these thoughts that are coming to your mind"; his suggestion that petitioner had committed the crimes in a fit of anger; his representation that he was petitioner's doctor; his assertion "If you don't tell us and get our help, I will wash my hands of you"; his statement "If you tell us the details and come across like a good man, then we can help you. I know that morally you were just in anger. Morally you are not to be condemned. Right?"; his promise "These people are going to throw the book at you unless that you can show that in a fit of temper you got so angry that you did it. Otherwise they toos (toss) premeditation in and its premeditation. See?"

This cross-examination was not the sole attack levied upon the later confessions. Dr. Clarence H. Bellinger,

Medical Superintendent of Brooklyn State Hospital (an institution for the care and custody of insane persons), with a long career in the practice of psychiatry and well-known in the community of Brooklyn, had sat by and heard Doctor Helfand's direct and cross-examination. He was then asked the two following questions, the first by defense counsel and the second by the trial court:

> "Q. Now, doctor, assuming that those actions of the doctor were mental coercion, can you say with reasonable certainty, doctor, that said mental coercion carried over and affected any other subsequent statements that might have been made by the defendant?"
>
> * * * * *
>
> "Q. Well, can you, as a scientific man, state that in this particular defendant's case, the mental coercion, if exercised upon the defendant, would carry over to any subsequent time? Can you state with any definite certainty whether in your opinion it did?"

Doctor Bellinger expressed the opinion that there had been such a carry-over. On cross-examination he amplified the basis for this opinion. An accurate summary of his reasoning may be found in the specification that Captain Meenahan's sitting in the chair formerly used by Doctor Helfand during his interview with petitioner constituted Meenahan a "surrogate" for the psychiatrist, and endowed Meenahan with the coercive powers which Helfand had shortly before exercised over petitioner's mind.

Doctor Bellinger's diagnosis did not go unchallenged by the People. Dr. John M. Murphy, a qualified psychiatrist, expressed a contrary opinion concerning Doctor Helfand's relations with petitioner and their effect upon the later con-

fessions to Meenahan, Herrschaft and the district attorney. He was familiar with the "surrogate" phenomenon relied upon by Doctor Bellinger but believed that it applied only where the psychiatrist so directed the patient to recognize the succeeding person as a substitute. The mere "taking over the chair" would not be sufficient "to carry over a mental coercion if there were any."

The issue—the scientifically important issue—thus raised by the conflicting views of Doctor Bellinger and Doctor Murphy was, we submit, put sharply in focus for the jury at this stage of the testimony, as later, during the defense, it was in even fuller degree pressed upon their attention. We submit that by this form of proceeding, and in this contention of evidence, the trial court gave the jury an eminently proper basis for their consideration of the "carry-over" question raised by Judge Froessel's direction which we have quoted at page 13 of this brief.

After the trial court had ruled that the voluntariness of the subsequent confessions was a question of fact for the jury, the confessions were put into evidence. Brief as are the summaries which we now set forth, they nevertheless show the truthfulness of the petitioner's confessions and, by their intimate detail of matters known only to petitioner, their freedom from suggestion by Helfand. They fit the pattern described in the concurring opinion of Mr. Justice Jackson in *Watts* v. *Indiana* (338 U. S. 49, 60):

> "We must not overlook that in these, as in some previous cases, once a confession is obtained it supplies ways of verifying its trustworthiness. In these cases before us the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful. Such corroboration consists

in one case of finding a weapon where the accused had said he hid it, *and in others that conditions which could only have been known to one who was implicated correspond with his story.* It is possible, but it is rare, that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity." (Italics ours.)

Confession to Captain Meenahan

Meenahan testified that at the close of petitioner's conversation with Doctor Helfand, he asked the doctor to call Meenahan, saying: "He seemed to be a good egg and I would like to talk to him if I could."*

Petitioner's confession to Meenahan pictured deliberate murder. He arrived at his parents' home at about eight o'clock in the morning of Tuesday, January tenth.** He found them at breakfast. An argument between him and his father, which had begun the previous Sunday, was resumed and in it the father threatened to put him and Herrschaft out of the father's business. The mother intervened and for the first time in petitioner's life he saw the father physically push her and heard him say to her: "Something I never told you in your life—keep your god damn mouth shut."

Petitioner told the father to go out for his newspaper and that upon his return they would go together to a

---

* To clarify this, we note that Meenahan and the district attorney were both in another part of the police precinct during the entire time that Helfand was talking to petitioner and thereby heard the entire conversation. It has never been contended that Meenahan or his associates practiced the slightest physical violence upon petitioner.

** This corroborates the testimony of a witness, Caroline Parnell, who was later to testify on behalf of the People that she had seen petitioner on the corner opposite the parents' home at about that time.

savings bank to withdraw some money in order to replace a check drawn on the business amount which had been returned for insufficient funds. (We now press the point which we made before the Court of Appeals: if this arrangement had actually been made—that is, for the petitioner and his father to go to the bank—why should petitioner have suggested that the father go for a newspaper and thus make an extra trip—an effort onerous for an aged man of seventy-five years? The father could have procured his newspaper as they went to the bank. The father's absence from the house, it is clear, was suggested so that petitioner could kill his mother and then await the return of his father for a similar murderous purpose. There is no question that the father did go for his newspaper between eight and nine o'clock. That was established by the testimony of Harry Rheim, a neighborhood newsdealer.)

Upon the father's departure, petitioner noticed a hammer lying on a dish closet. When he picked it up, his mother asked: "What are you going to do with that?" He answered: *"I am going to hit him over the big skull when he comes back. * * * This is going to end for once and for all."* When his mother sought to calm him, he struck her several times on the head with the hammer. He was impelled to the murderous deed by an "instinct". *He did not want her to see him hit the father.*

In the very moment, almost, of this awful and unnatural deed, petitioner heard his father returning. He went the long way from the kitchen in the rear of the apartment to the front door and, as the father turned to close that door, struck him with the hammer. The father "turned around to sort of put up a struggle." Petitioner struck him, and

struck and struck again—a prolonged assault pregnant with premeditation which clearly stamps the killing with the mark of first-degree murder.

The murderer—uniquely a matricide and patricide—then wrapped the death weapon in a towel and left the house. As he walked along the street, he threw it into a passing truck. He went back to his love-nest in Manhattan, bathed and changed his bloodstained clothing, later giving these to a passing rag picker. Then, taking with him a box of candy as a present for his wife, he went to New Jersey. He remained there but a scant period and returned to New York shortly after noon. Later in the day, he went with Herrschaft and Valdez back to his parents' home and discovered (!) the bodies.

The Confession to Herrschaft

After petitioner had unburdened himself to Meenahan, he spoke to his business partner Herrschaft at 7:30 P.M. Friday, January thirteenth. (The petition claims that one confession was made "after another without interruption" (Petition, p. 31). There is no proof of this. Certainly the Court of Appeals made no point of it. In both its reversing and affirming opinions, the Court was concerned with the *legal* question of instruction to the jury, and not at all with the *factual* element of time intervals between the confession. The record does not disclose the length of the interval.)

Petitioner gave Herrschaft the combination to the business safe, saying: "Here is the combination of the safe. I want you to get administrative powers and operate the company." Since Herrschaft had never before had the combination, he was understandably perplexed. Petitioner

explained to the startled Herrschaft: "Well, you know what it is all about; I did it."

Herrschaft asked: "Do you mean that you killed your own mother and father" and petitioner replied: "I did." In amazement, Herrschaft asked why and petitioner answered: "Oh, I don't know; I guess I just blew my top."

Be it noted that Herrschaft, although he had been in and about the police station for several hours prior to this meeting with petitioner, was not spoken to by any one in authority. Moreover, the fact that his conversation with petitioner was being recorded was unknown to him. There is not a scintilla of proof that petitioner's confession to Herrschaft was other than completely voluntary.

This was utterly damning testimony by a witness whose prior friendly relations with petitioner could not well be questioned. It was so assayed by defense counsel, who entered upon the most rigorous kind of cross-examination which, however, in no way affected either the credibility or the force of Herrschaft's direct evidence.

In the brief before the Court of Appeals, counsel spoke of the confession to Herrschaft as only "a cryptic admission by the appellant." This has always struck us as a masterpiece of understatement.

Confession to District Attorney

More than two hours after his unsolicited confession to his friend and partner, Herrschaft, petitioner again confessed—this time to representatives of the district attorney. His confession was *in narrative form.* The assistant district attorney said: "Tell us exactly in your own words what

transpired after you got into your folks' apartment'' and from then on petitioner in detail, in his own words, depicted the story of the slayings. No one familiar with the differences between coached or suggested confessions, and true confessions, could have the least doubt that the recital came out of the reservoir of petitioner's experience and not from any one's promptings. Again we point to its conformity with the test described by Mr. Justice Jackson in *Watts* v. *Indiana, supra* (p. 16, this brief).

We summarize: He arrived at his parents' home at about 8:30 A.M. on Tuesday, January 10, 1950. At the door some pleasantries passed between him and his mother, who admitted him. In the kitchen, he found his father at breakfast. Immediately there ensued the continuance of a business argument which had occurred on the previous Friday and Sunday. In great anger, the father made ''several nasty allegations'' about petitioner and Herrschaft and the partnership between them, claiming that it existed to the detriment of his own business in which they were simultaneously employed. The mother took sides with petitioner and expressed the wish that the aged father should discontinue his business activities. For the first time in petitioner's knowledge, the father pushed the mother. Finally, the father left to buy his newspaper but not before he had conferred ''a few parting insults to myself and my mother.'' While Leyra, Sr. was absent, petitioner told his mother that upon his return ''we will settle this argument once and for all.'' She tried to calm him. There then shortly occurred the double killing which petitioner thus pictured:

> ''He then came through the outer hallway and entered the apartment. While he was entering, I picked up a hammer that was laying on the shelf

> of the dish closet between the dish compartment and the knife and fork drawer. I finally became violent at this point. This violence was the direct cause of the double tragedy."

He struck his mother with the hammer and, going into the hall to meet his returning father, struck him on the head a number of times.

Petitioner told how he left the apartment and disposed of the towel-wrapped hammer by throwing it into a passing truck. He went to his Manhattan apartment, showered and changed his bloodstained clothes which he gave to a rag picker. His next step was to go to his New Jersey home with the birthday gift of a box of candy for his wife. (It cannot escape conviction that his visit was not for the uxorious purpose of celebrating her birthday, but solely for the fabrication of an alibi.) There he remained not more than half an hour.

Under oath, two assistant district attorneys, who witnessed petitioner's demeanor while he made these confessions, testified that he was in all respects normal. One, Mr. Gitlin, described him as "calm, cool, and spoke to me in a quiet manner, and told me the entire story." *It is noteworthy that defense counsel did not cross-examine either of these witnesses.*

Further Psychiatric Testimony for the People

We have adverted to the conflict between Doctor Bellinger, on behalf of the defense, and Doctor Murphy for the People, concerning the "surrogate" theory as the basis of the "carry over" effect of Doctor Helfand's treatment of petitioner on the subsequent confessions. To dispel the

fog of mystery which this clash between psychiatric experts must have engendered for the lay jury, Doctor Helfand was called. He testified that when Captain Meenahan came to the room at the conclusion of Helfand's interview with petitioner he merely, in politeness, said: "You can take my seat, captain." This was indeed a simple factual situation out of which, like the genie from Sinbad's bottle, emerged the whole portentous "surrogate" defense.

Defense counsel sought to cross-examine Helfand but did not limit himself to the issue thus raised. He went further into the transcript of the wire recording which had been made during the Helfand-petitioner contact seeking to show that Helfand had suggested to petitioner both the substance and the details of his later confession to Meenahan, Herrschaft and the District Attorney. *Out of the hearing of the jury,* the trial court thus warned counsel:

> "The Court gives you notice, and serves notice upon you now that you are opening the door to a reading of the entire record that was had, concerning the questions put by Dr. Helfand, and the answers made by this defendant. I have studiously kept that out of the record, having in mind the decision of the Court of Appeals. You are now, by your conduct, insisting that the record be brought into evidence."

Counsel nevertheless persisted in referring to the wire recording to a point where the prosecutor felt constrained to offer, and the court to receive, the entire transcript thereof on this question of suggestion. The court received it, however, subject to all its infirmities, invalidities and illegalities, saying:

> "I am receiving this merely on the question as to whether or not whatever statements the defendant

made then, or he may have made later, were inspired by this doctor; were put into this defendant's mouth by this doctor, was put into his mental reservoir by this doctor, and I say the issue has been raised by counsel, and I think the District Attorney is within his rights in offering this evidence; and on the question of whether or not the confession was voluntary or involuntary, *I rule it was involuntary. I rule it was illegal,* but on the question as to whether or not the doctor inspired what the defendant later said is a question that has now been raised by counsel for the defense and your objection is overruled.

Mr. Healy: And another ground—

The Court: It is only for that reason I will take this evidence and no other reason, and I shall instruct the jury at length on that point during my charge, if the case is submitted to the jury."

The court's reason for permitting the reception of the wire recording transcript was again expressed in this fashion:

"Now that the question has been asked of the doctor 'Didn't you suggest this' and 'Didn't you suggest that?' don't you think the jury has a right to know what happened between the defendant and Doctor Helfand to determine what the defendant later said was out of the reservoir of his own mind? Did it come from his mental storeroom, or was it something that was placed there by a physician who concededly used, according to the decision of our highest court, mental coercion? I think that is logical. That is sense. And I think without that I would be depriving the prosecution of what belongs to them, what is their right. You cannot ask a question of that kind and plant a seed of suspicion in the minds of the jury and say, 'Oh, no, we will

> not let you see the rest of it. We will hold you to this one little question,' and then go to the jury and say, 'You see, gentlemen, of course, he made a confession later, but what happened was this: Dr. Helfand put all these details into his mind, that he was merely a puppet, merely a ventriloquist's dummy, what some doctor put in his mind. If that is not law, it is just good horse sense, good common sense, and I don't think you can shut off the District Attorney after opening the door as you did, after being twice warned."

The next step in the development of the People's case was the reading into the record of petitioner's testimony at the first trial, concerning his relations with Doctor Helfand. The substance of that testimony was that as a result of the doctor's physical manipulation of petitioner's body and mental treatment of petitioner's mind, he ultimately "drifted off so I lost consciousness. From that time on I did not remember anything until Sunday." *

The Defense

Unlike his action on the first trial, petitioner did not testify at the second trial. Instead Doctor Bellinger was recalled to amplify the "carry over" testimony which he had given on the *voir dire*. We speak respectfully of Doctor Bellinger, for he has since died. Nevertheless, he did make many statements which seem to us, and must have seemed to the jury, medically as well as factually impossible. We

---

* This part of the trial is the basis for the second point in the present petition in which it is claimed that the reading of petitioner's testimony on the former trial was a violation of his rights under Article V of the Federal Constitution. We deal with this point at page 55 *seq.* of our brief.

give as only one example his assertion that even though petitioner's answers to the questions put to him by the district attorney during the last confession were coherent, responsive and descriptive, and even though the questions themselves were not leading in nature, nevertheless, petitioner's mental condition at the time of interrogation was that of a "deep state of mental coercion" and that "he was in a merely semi-conscious condition".

These dogmatic assertions were denied completely by Doctor Murphy, who found from the voluntary and detailed nature of the confessions to Meenahan, Herrschaft and the district attorney's representatives that petitioner had free will, and was fully conscious, when he inculpated himself.*

We turn now to the trial court's charge on the subject of the confessions to Helfand and the later ones to Meenahan, Herrschaft and the district Attorney. It is impossible to show the complete fairness and propriety of that charge by summary and, therefore, insofar as it deals with these confessions, we give it in full:

> "Let us return now, Gentlemen, to a consideration of the alleged confessions said to have been made by this defendant. I charge you, Gentlemen, of the jury, that the law governing confessions is as follows:
>
> 'A confession of a defendant, whether in the course of judicial proceedings, or to a private person, can be given in evidence against him, unless made under the influence of fear produced by

---

* Certainly this passage at arms between the two pundits raised an issue of fact which the jury, under both the state and federal law, were entitled to resolve against Doctor Bellinger. (*People* v. *Leyra, supra; Lee* v. *Mississippi*, 332 U. S. 742, 92 L. Ed. 330.)

threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor. It is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.'

"I shall now deal, gentlemen, with the last provision of the statute, namely, 'It is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.' This simply means that it must be established by the evidence that, in addition to the confession, there was proof that the crime charged had been committed. The law does not demand that there be an eyewitness who saw the crime committed. All that the law requires is that it be established in this case that Mrs. Leyra was killed by someone and that Mr. Leyra, Sr., was killed by someone. In connection with this matter, you will consider the testimony given by those who discovered the bodies, the testimony of Dr. Ruger as to the violence that was visited upon these persons which allegedly caused their deaths.

"Now, what do we mean by the word 'confession'? A confession, gentlemen, is a voluntary statement made by a person declaring that he committed the crime. The form of the confession is immaterial. Testimony of an oral confession is competent even though it has not been reduced to writing and signed by the accused. It may consist of detailed conversations with people, it may be a formal confession. A confession is admissible although elicited in answer to questions which assume the person was guilty.

"As you have already been instructed, the burden of establishing each and every element of the crime charged, and the guilt of the defendant thereof, must be borne by the prosecution. Therefore, the

burden of establishing the voluntariness of the confession must be borne by the prosecution. The word 'voluntary' imports a condition of mind which is free and unconstrained. In other words, was the making of the confession a free exercise of will on the part of the defendant? Was it made with a full and complete knowledge of the nature and consequences of the confession, free from influences affecting the will of the defendant at the time confession was made. It is obvious that, if a confession itself is to have any testimonial value, it must be shown to have been made under conditions where there was normal exercise of all the faculties, and that the declarent fully comprehended the effect of his confession. As to whether a confession is voluntary, or involuntary, is a question of fact for the jury.

"There are several problems that arise in this case with reference to the confessions allegedly made by this defendant. Let us first consider the alleged confession made to Dr. Helfand. Does this confession meet the specifications provided by the statute which I have read? (a) Was it voluntary? (b) Was it induced by any promise of leniency?

"*I charge you, gentlemen, as a matter of law, that the so-called Helfand confession was not voluntarily made; that it was due to mental coercion practiced by the physician upon the defendant. That, in and of itself, renders it worthless as evidence of guilt. It may not be regarded by you, even in the slightest degree, as any evidence of guilt. I charge you also, as a matter of law, that this so-called Helfand confession is invalid and may not be considered by you as evidence of guilt, on the further ground that Dr. Helfand, who was then acting for the District Attorney, made a promise to the defendant in order to induce him to confess, and,* thus, did induce him to

confess by reason of such promise; the said promise being, in effect, that if he made such confession, he, the defendant, would not be prosecuted for the capital offense of murder in the first degree, but, possibly, for a lesser crime. *Therefore, it is now clear that the Helfand confession may not, under any circumstances, be considered by the jury as evidence of guilt.* The Helfand confession becomes material with regard to another problem which I shall discuss with you later.

"We shall now consider the so called Meenahan confession. First, we must determine whether the confession was made. If you find that such confession was in fact made, as claimed by the prosecution, you must then determine whether the provisions of the law governing confessions which I have already called to your attention have been violated, and, thus, rendered the confession worthless as evidence of guilt.

"As already noted, you must determine whether this confession was voluntarily made. The burden is upon the People to satisfy you beyond a reasonable doubt that it was voluntary and not made under a promise of leniency.

"In arriving at a solution of these problems, I charge you that you are bound to consider the established fact that Dr. Helfand practiced illegal coercion upon the defendant and made authorized promises of leniency to him. *The presumption is that such coercion and promise of leniency continued to affect the defendant's later confessions;* unless the prosecution has convinced you, beyond a reasonable doubt, from all the credible evidence in the case, that such coercion and promise of leniency did not extend over and affect the later confession made to

Meenahan. Unless you are so convinced, the later confession made to Meenahan must be entirely disregarded and not considered by you as evidence of guilt.

"Let us now turn our attention to the so called Herrschaft confession. Gentlemen, the same elements must be considered by the jury, to wit: Was the confession made? Was it voluntary? Did the Helfand coercion and the promises extend over and affect this confession? Did the prosecution sustain the burden of establishing, beyond a reasonable doubt, that the coercion and promises did not carry over and affect the Herrschaft confession? Is the confession true? The same principles of law, to which I have made repeated reference, apply with equal force in this instance. It is only if you find, beyond a reasonable doubt, that the confession was voluntarily made and true that you may consider it as evidence of guilt.

"With regard to the so called Assistant District Attorney's confessions, the very same rules apply in this regard. The same standards to which I referred in discussing the Meenahan and Herrschaft confessions, concerning voluntariness, apply to this confession as well. The People must, as in the other instances, prove to your satisfaction, beyond a reasonable doubt that this confession was voluntarily, made in order that it may be considered by you as evidence of guilt. You must also be satisfied, beyond a reasonable doubt, that the promise of leniency made by Dr. Helfand did not carry over and induce and influence the making of this confession to the Assistant District Attorneys.

"Each confession, gentlemen, must be considered separately. Is that clear? Each stands on its own

bottom. The jury must determine whether the particular confession under consideration has been obtained in violation of law which the Court has charged. Was the Meenahan confession legally obtained? If it was, then the jury must act upon it. If it was illegally obtained, the jury will reject it. Was the Herrschaft confession legally obtained? If it was, the jury will consider it. If it was not, it is worthless as evidence. Was the Assistant District Attorney's confession legally obtained? If it was, the jury will consider it. If it was not, it must be rejected as worthless.

"Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the Court rules, as a matter of law, that all of the other evidence in the case offered by the prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty.

"Gentlemen, you will recall that I permitted the District Attorney to read the Helfand confession. Although the Court has declared the same, as a matter of law, to have been obtained by illegal means, the reason for the Court's action is as follows: During the course of the cross examination of Dr. Helfand, defense counsel sought to establish that the doctor prompted the defendant; in other words, suggested to him certain details concerning the commission of the crime. It may, therefore, become material, when the jury examines the contents of the Meenahan, Herrschaft, and the Assistant District Attorney's confessions, to ascertain to what extent, if any, Dr. Helfand had prompted the defendant. *In other words, whether details that he, the defendant allegedly related in the Meenahan, Herrschaft and Assistant District Attorney's confessions were*

something that was inspired by Dr. Helfand, or, was the defendant, himself, the author of the details that he allegedly supplied in the several confessions?

"Gentlemen, I have not dealt here at any length whatever with the testimony adduced by the experts called by the respective parties, that is, Dr. Bellinger and Dr. Murphy. It is appropriate, however, to present in capsule form the contentions of the parties:

1. The defendant contends, with what force and effect, of course, it is for you to say, that the coercion and promise referred to did in fact carry over and into each of the subsequent confessions.

2. The prosecution, on the other hand, contends that the coercion and promise by Dr. Helfand did not in anywise extend over into any of the confessions made to Meenahan, then to Herrschaft, and then to the Assistant District Attorneys; that the confessions so made to these persons were entirely voluntary and not induced by any promise of leniency.

"You have heard the testimony of these experts. They have given you their conclusions; they gave you their reasons for their conclusions. Gentlemen, the law permits an expert who is skilled in a particular science not only to testify to facts, but to give his opinion upon questions of a scientific nature. This is allowed because an expert is supposed, from his experience, research and study, to have a peculiar knowledge upon the subject of the inquiry, and an expert is supposed to be more capable than a layman of drawing conclusions from facts and to base his opinion upon them.

"In determining the value of the testimony of an expert, you should consider his learning, profes-

sional standing, opportunities for study, and his experience. It is of great importance that, in appraising the testimony of an expert, due consideration be given to all of these factors and that the facts from which his conclusion is drawn should be found to be satisfactorily established, since false premises may render such an opinion valueless. The testimony of an expert serves merely as a guide to the jury in its deliberations on the facts, of which they are at all times the sole and exclusive judges. Expert testimony should not be accepted or rejected indiscriminately, but it is to be weighed and considered by the jury the same as any other evidence. After weighing and considering such evidence, the jury is at liberty to disbelieve it when it is improbable, or when it is discredited, or when the jury believes that an expert witness has testified falsely, or was mistaken with respect to any material fact or opinion. The reasons or opinions of an expert are not conclusive upon a jury; but the jury should not arbitrarily or lightly reject the testimony of an expert, nor should the jury accept it just because the witness is an expert." (Italics ours.)

Jurisdiction

The jurisdiction of this Court is invoked under Sections 1257 (3) and 2101 (c), Title 28 U. S. Code and Rule 38-1/2 of this Court.

We are confident of our ability to demonstrate that jurisdiction is totally lacking; that petitioner's confessions to Captain Meenahan, Herrschaft and the district attorney were lawfully obtained under both state and federal law; that in the matter of procedure the issue as to the legality of such confessions was properly submitted to the jury and

that, therefore, in this respect there was no denial of due process. The contention that the three subsequent confessions "were so close in point of time and circumstances to the first, that they should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible" is, we shall show, without basis in fact or law. We are further certain that no error was committed by the trial court in permitting the jury to receive the testimony of the petitioner on his first trial, despite the fact that he did not take the witness stand during the second trial.

We do not argue petitioner's fourth contention that *sans* all the later confessions "the state has failed to make out a case." This is, we submit, but a straw man set up to be knocked down. The trial court submitted the case to the jury on this point in this language:

> "Gentlemen, if all of the confessions are rejected by the jury, the defendant must be acquitted, for the reason that the court rules as a matter of law that all of the other evidence in the case offered by prosecution, even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty."

It is our submission that none of the decisions of this Court dealing with due process condemns the trial-procedure here presented and that, therefore, the petition is wholly devoid of merit.

ARGUMENT

I.

Petitioner's first and third points are so closely related that they may be met by one answer. The claim is that the invalidity of the Helfand confession, legally determined to exist by reason of mental coercion and promise of immunity, so permeates and taints the subsequent confessions to Meenahan, Herrschaft and the district attorney, that the latter group were themselves inadmissible to a point where their reception in evidence constitutes a denial of due process under the Fourteenth Amendment. The elements relied upon to establish the continuity of the original invalidity are (1) the closeness in point of time between the making of the Helfand confession and of the later group, and (2) the consequent "carry-over" phenomenon.

Partial support for this position—to the extent that it is based on the element of promise of immunity—is found in the dissenting opinion of Fuld, *J.*, in the Court of Appeals that:

> "The trial judge charged unequivocally that Dr. Helfand had promised defendant, 'in order to induce him to confess,' that he would not be prosecuted for murder in the first degree, that such promise was authorized by the district attorney and that defendant confessed in reliance upon it. Consequently, as the trial court went on to charge, that confession was inadmissible as a matter of law. (See Code Crim. Proc. §395.) In view of that charge—which, of course, became the law of the case—it necessarily follows, as a matter of ineluctable logic, that any and all other confessions to the district attorney or those associated with him in the investigation and

> prosecution of this very homicide, must also be deemed to have been induced by that promise, and likewise inadmissible. Accordingly, when the court further instructed the jury that it might find that the confessions to assistants of the district attorney and to a police captain—made within an hour or two after immunity had been promised—had not been induced by the promise, it pursued a course that was not only opposed to logic, but incompatible with the law of the case. That was error highly prejudicial to defendant."

It is obvious both from this quotation and from Judge Fuld's entire dissenting opinion (in which Loughran, *Ch. J.* concurred) that he finds fault with the submission to the jury of the Meenahan and district attorney confessions only upon this ground. It was the promise of immunity alone which in his opinion was the tainting factor. He considered it legal and proper to permit the jury to pass as a question of fact upon the voluntary nature of these confessions insofar as the element of "mental coercion" was claimed to have invalidated them for all time. The defense contention that the period of time intervening between the Helfand confession and these confessions was so short as to obviate any possibility that the effects of the mental coercion by Helfand had disappeared was, he holds by silence on the subject, not grounded in law.

With great deference to the learned judge, we submit that what he considers "a matter of ineluctable logic" as to the inescapable fact that the Helfand promise of immunity induced the subsequent confessions, is completely contradicted by the combination of the records of the two trials. We concede here, as we conceded in the Court of

Appeals, that if petitioner had admitted the fact of his confessions and had contended that he was induced to make them by the promise of immunity, that promise would have bound the district attorney to prosecute him for manslaughter only. Petitioner's position, however, has always been that actually he consciously made no confession to Meenahan, Herrschaft or the district attorney and, further, that if such confessions existed, they were procured from him during a period of unconsciousness which lasted from early Friday morning, January 13th, until Sunday morning when he regained consciousness.

What is at issue is, not a syllogism, but a state of mind. Our answer, therefore, to Judge Fuld's position is that the key to this question lay, not in "a matter of ineluctable logic", but in the determination of a question of fact: Did petitioner make the subsequent confessions consciously, and uninfluenced by the promise of immunity, or did he make the subsequent confessions under the influence of the promise, or did he, in fact, not *consciously* make the confessions at all? That this was a question of fact, to be resolved by the jury under proper guidance by the trial court, cannot be denied (*People* v. *Leyra, supra; Lee* v. *Mississippi,* 332 U. S. 742; 92 L. Ed. 330). Nor can it be doubted that the instructions to the jury were of the utmost clarity. Dye, *J.*, speaking for the majority of the court, says:

> "According to the record now before us, the Helfand confession was again received in evidence 'merely on the question as to whether or not whatever statements the defendant made * * * were inspired' by Dr. Helfand, an issue raised by defense counsel. This was received after the trial court had cautioned counsel at length, followed by a most

explicit and detailed instruction to the jury as to its illegality phrased in most simple and understandable language that they might not consider it on the issue of guilt under 'any circumstances', but were limited to a consideration of its effect on the later confessions, and that these two were to be entirely disregarded if found to be dependent upon it in any respect whatsoever, a distinction which each individual juror signified that he understood. The Trial Judge did not stop there but dealt with it in his main charge and we believe fully and adequately by pointing out again and again that as a matter of law the confession made to Dr. Helfand was not to be considered on the issue of guilt. Moreover, he was careful to instruct the jury as to the defendant's contention leaving them to say with what force and effect the 'coercion and promise * * * did in fact carry over and into each of the subsequent confessions' at the same time giving like instructions as to the People's contention, leaving it for the jury to say whether the later confessions made to other persons 'were entirely voluntary and not induced by any promise of leniency.'

"In this manner and by this means the defendant's statement to Dr. Helfand was effectively insulated from the jury for consideration on the issue of guilt and was made available to them for the sole and limited purpose of saying whether or not the later statements made to others were dependent in any way on coercion or inducement, coupled with the clear and positive instruction that if so found to be, it was 'worthless as evidence'. Such submission for separate consideration was in obedience to our specific ruling at the prior trial.

"When the Trial Judge charged that as a matter of law a promise of leniency had been made by Dr.

> Helfand, he did not thereby make that statement 'the law of the case' to such an extent as to deprive the jury of the benefit of his instruction as to 'carry over and inducement'. That was the precise issue they were required to pass upon. The 'law of the case' governing the jurors in their deliberations is to be found in the charge in its entirety and is not to be taken from a ruling concerning the limited nature and effect of a single item of evidence, particularly, when the point said to be prejudicial, as here, has been specifically excluded. The law governing the retrial of this case was explicitly laid down by us at the prior trial which was that the statement to Dr. Helfand was coerced and worthless as evidence. The circumstance that the Trial Judge also said it was worthless, because a promise had been made as a matter of law, did not in any way prejudice the defendant. It was, if anything, to his advantage."

This Court has, under somewhat similar facts, felt itself to be bound by a jury's verdict of guilt and the affirmance thereof by the highest court of a state. In *Lisenba* v. *California* (314 U. S. 219), it is written:

> "The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement; * * *. He exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."

It is, moreover, of importance in the consideration of this petition that the Court be acquainted with the distinc-

tion made by Judge Fuld between the Meenahan and district attorney confessions, and that made to Herrschaft. The learned Judge says:

> "Nor does the existence of the confession that defendant made to Herrschaft, his friend and business associate, change the situation or permit an affirmance. True, that confession may stand in a category different from those made to prosecutor and police; *other considerations, considerations separate and apart from the district attorney's promise, may have prompted defendant to confess to his friend.* I am willing to assume, therefore, that the court was warranted in leaving to the jury the question whether or not the promise induced defendant's confession to Herrschaft, but that does not dispose of the matter. Since the jury also had before it the two confessions made to the law enforcement officials, and since those confessions played a not unimportant part at the trial, no court can say that the jury, in reaching its verdict, either relied solely upon the confession to Herrschaft or disregarded entirely the other confessions." (Italics ours.)

We have, we submit, thus demonstrated that of the six Judges who in the Court of Appeals participated in the second decision of the case, five, including the dissenting Chief Judge and Fuld, *J.*, either directly or by failing to write any dissent from the majority, held it to have been proper for the Trial Court, *on the issue of coercion* to submit to the jury as a question of fact the voluntariness of the confessions to Meenahan, Herrschaft and the district attorney (Froessel, *J.* concurred in the affirmance under the provisions of Code Crim. Proc. Sec. 542). That deci-

sion, therefore, established that on the question of mental coercion the subsequent confessions were valid under the provisions both of New York State Constitution, Article 1, Section 6:

> "No person shall be deprived of life, liberty or property without due process of law."

and Code Criminal Procedure, Section 395:

> "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

If, therefore, as we are certain is the case, there is no legal basis for the distinction between "mental coercion" and promise of immunity as made by the dissenting minority of the Court of Appeals then the curative submission of these questions of fact to the jury should control in the second as in the first element.

Petitioner here contends that nevertheless the reception in evidence of these subsequent confessions constitutes a violation of his rights under the due process clause of the 14th Amendment of the Federal Constitution because

(1) The Helfand confession was obtained by means of mental coercion, etc., and promise of immunity, and

(2) The subsequent confessions "were so close in point of time and circumstances" to the Helfand confession that these should not have been received for the same rea-

sons "which vitiated the first confession and made it inadmissible".

In support of this contention, petitioner cites twenty-four cases decided by this Court. It is our submission that none of these cases supports his contention. They fall into four classes:

(1) Affirmance by this Court of convictions in state courts with opinions from which petitioner has taken language stating general principles. Some of these cases even involve facts closely similar to the instant case (*Adamson* v. *California*, 332 U. S. 46, 191 L. ed. 1903; *Gallegos* v. *Nebraska*, 342 U. S. 55, 96 L. ed. 86; *Lisenba* v. *California*, 314 U. S. 219, 86 L. ed. 166; *Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. ed. 1481; *Stroble* v. *California*, 343 U. S. 181, 96 L. ed. 872, rehearing denied 343 U. S. 951, 96 L. ed. 1353).

(2) Reversals by this Court of convictions in state courts, but involving cases where only one involuntary confession was the basis of a conviction or where, although later confessions were held to have been legally obtained, an earlier and invalid confession was also permitted to be considered by the jury (*Malinski* v. *New York*, 324 U. S. 401, 89 L. ed. 1029; *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. ed. 682; *Chambers* v. *Florida*, 309 U. S. 228, 84 L. ed. 716; *Canty* v. *Alabama*, 309 U. S. 628, 84 L. ed. 988; *Haley* v. *Ohio*, 332 U. S. 596, 92 L. ed. 224; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. ed. 1815; *Lomax* v. *Texas*, 313 U. S. 544, 85 L. ed. 1511; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. ed. 1810; *Vernon* v. *Alabama*, 313 U. S. 547, 85 L. ed. 1513; *Ward* v. *Texas*, 316 U. S. 546, 86 L. ed. 1663; *Watts* v. *Indiana*, 338 U. S. 49, 93 L. ed. 1801; *White* v. *Texas*, 310 U. S. 530, 84 L. ed. 1343).

(3) Cases involving prosecution in federal courts and thus governed by Article V. of the Constitution and not germane to a case emanating from a state court (*Bramn* v. *United States,* 168 U. S. 569, 42 L. ed. 530; *McNabb* v. *United States,* 318 U. S. 332, 87 L. ed. 819; *United States* v. *Carnigan,* 342 U. S. 36, 96 L. ed. 48);

(4) Cases not involving oral confessions but sundry other constitutional or statutory rights, as exclusion of Negroes from grand jury membership (*Pierre* v. *Louisiana,* 306 U. S. 354, 36 L. ed. 757) or forcible use of an emetic (*Rochin* v. *California,* 342 U. S. 165, 96 L. ed. 183).

We think it obvious that the first class of cases needs no discussion here. Even in the cases cited under the second class, this Court has left room for the use by the state of subsequent confessions where the proof adequately showed that the effect of the original coercion had evaporated and was not the inducing cause of later confessions. Thus, in *Malinski* v. *New York, supra,* the first of a series of confessions was held to be coercive and involuntary and, therefore, illegal and inadmissible. This Court reversed an affirmance of the conviction by the Court of Appeals despite the existence of subsequent confessions suffering from none of these disabilities. The reason for the reversal, insofar as it was due to the relation between the first and the later confession, is stated by Douglas, *J.* (p. 410):

> "The jury at no time was admonished that it could not convict on the basis of the first confession, nor consider it as evidence against Malinski."

The similarity between *Malinski and the instant case upon its first trial* was pointed out by Froessel, *J.* (302 N. Y. 353, 364):

> "We recognize that due process is not lacking where upon facts permitting different conclusions, it is left for the jury, under a proper submission, to say whether there was coercion (Malinski v. New York, supra; Lisenba v. California, supra; Lyons v. Oklahoma, 322 U. S. 596), * * *."

Petitioner's citation of *McNabb* v. *United States, supra,* as an example of the third class of cases involving federal court prosecutions, is of no assistance to this Court; nor can aid be found in the cases comprising the fourth class.

We place our reliance for the legality of petitioner's conviction on the cases of *Lisenba* v. *California, supra, Lyons* v. *Oklahoma, supra,* and *Stroble* v. *California, supra.*

In *Lisenba,* the appellant was arrested on the Sunday morning of April 19th. Although he was brought to the district attorney's office and stayed there for several hours, he was not questioned. Thereafter he was questioned for about an hour concerning an incest charge not involved in the murder. In the later afternoon, he was fed at a cafe and during the night "various officers questioned him in relays". He remained fully dressed and without sleep, sitting in a chair. Monday morning he was given breakfast and then the questioning was resumed and continued until about three o'clock Tuesday morning. Appellant said that he fainted. Others described it as sleep. After he had breakfasted, he was placed under arrest, arraigned before a magistrate and committed on the incest charge. Appellant testified on his murder trial that during the

questioning from Monday evening until Tuesday morning, he was badly beaten. There was both corroboration and denial of this testimony. The state, however, did not deny that he "was repeatedly and persistently questioned at intervals during the period from Sunday night until Tuesday morning". During this period of April 19-21, he "made no incriminating admission or confession".

On May 1st, appellant's accomplice was arrested and made a statement. On May 2nd, appellant was confronted with the accomplice but refused to make any statement. Later in that day, he was questioned by the district attorney until supper time and then, after he received some food, until later in the night. Appellant made no incriminating answers. The state's testimony showed that about midnight when appellant was alone with a deputy sheriff, he turned to the officer and "said something to the effect: 'Why can't we go out and get something to eat; if we do, I'll tell you the story.' " Appellant was taken to a public cafe and fed, and then confessed. He later repudiated the confession with the claim that it was merely an attempt on his part to retell the tale which the accomplice had told and "which had been constantly dinned into his ears". There were, however, discrepancies in the two stories.

A preliminary *voir dire* was held at the trial and the trial court admitted the confession in accordance with California law (identical with that of New York). The trial court also charged the jury "that the confessions must be utterly disregarded unless they were voluntary, that is, not the result of inducement, promises, threats, violence, or any form of coercion."

This Court found that there had been an illegal and criminal violation of the California statute requiring

prompt arraignment. Denial of opportunity to consult counsel was also determined to have existed. The Court also commented on the lack of authority in the taking of appellant from jail to the district attorney's office for questioning. Nevertheless, the Court limited the issue to the voluntary or involuntary character of the confessions elicited from appellant, these other circumstances being only items to be appraised "in determining whether the use of the confession was a denial of due process". In sustaining the conviction, the Court wrote:

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> "Here judge and jury passed on the question whether the petitioner's confession were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty then is to determine whether the evidence requires that we set aside the finding of two courts and a jury and adjudge the admission

of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty as to amount to a taking of life without due process of law.

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claim of physical violence, threats or implied promises of leniency. There remains the uncontradicted fact that on two occasions, separated by an interval of eleven days, the petitioner was questioned for protracted periods. He made no admission implicating him in his wife's death during, or soon after, the interrogations of April 19, 20 and 21. If, without more, eleven days later confessions had been forthcoming we should have no hesitation in overruling his contention respecting the admission of his confessions.

"Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? *If we are so to hold it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials.* There is less reason for such a holding when we reflect that we are dealing with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial it must be plain that a federal right has been invaded." (Italics ours.)

Stronger even than *Lisenba* in support of the instant judgment is *Lyons* v. *Oklahoma, supra.* The parallelism in fact of the two cases is set by Mr. Justice Reed's statement:

> "This writ brings to this Court for review a conviction obtained with the aid of a confession which furnished, if voluntary, material evidence to support the conviction. As the questioned confession followed a previous confession which was given on the same day and which was admittedly involuntary, the issue is the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, *particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.*" (Italics ours.)

In *Lyons,* petitioner was interrogated for about two hours immediately after his arrest. Eleven days later he was questioned in the prosecutor's office from about six thirty in the afternoon until between two and four o'clock in the morning, when a confession was forthcoming. Later that day, a second confession, procured at the state penitentiary, was made. Two days later a third confession to a penitentiary guard came forth. Petitioner had no counsel until after all confessions had been given. There was testimony in his behalf—denied by the officers—of physical abuse prior to his first interrogation, as well as evidence of threats of further harm unless he confessed. The evidence of abuse with respect to the second and third confessions was denied by those alleged to have inflicted it. In addition, petitioner was admittedly subjected to a view of a pan of the victim's bones which was placed in his lap

prior to the first confession. Of this episode,* the Court said:

> "As the confession obtained at this time was not offered in evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary."

The second confession—that is, the one first given at the penitentiary—was objected to on the ground that "force was practiced to secure it and that even if no force was then practiced, the fear instilled by prisoner's former treatment at Hugo on his first and second interrogations continued sufficiently coercive in its effect to require the rejection of the second confession".

A preliminary *voir dire* was properly held and after the admission of the confession under instructions favorable to the defendant that such confessions should be "carefully scrutinized and received with great caution", the ultimate question of defendant's guilt was submitted to the jury. Conviction resulted. This Court sustained the judgment and in so doing announced several principles which, we submit, conclusively determine the validity of the judgment now under review:

> (1) Neither common law nor constitutional due process prohibit the questioning of a suspect while in custody of police officers;
>
> (2) It is a matter for state courts to determine the wording of instructions upon the involuntary character of a confession and if such instructions fairly raise the question, the requirements of due process are satisfied;

---

* Which we relate to the Helfand contact.

(3) While this Court is under the duty of examining into the evidence as to the voluntary or involuntary nature of the confession "no formula to determine this question by its application to the facts of a given case can be devised".

(4) Where an improperly obtained confession is not used at a trial but one later made is, then:

"The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practice which may fairly be drawn from the surrounding circumstances."

(5) In amplification of this last mentioned principle, the Court wrote:

"The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at the trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. *If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain suituation, that the confession should be admitted as voluntary, cannot be a denial of due process.*" (Italics ours.)

The argument now made by the instant petitioner as to closeness of time and carry-over was also made in *Lyons*. This Court thus answered:

> "Petitioner suggests a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. We need not analyze this contention further than to say that in this case there is evidence* for the state which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlester."

We turn now to *Stroble* v. *California, supra,* as authority of the most cogent kind for the affirmance of the instant judgment. The principle of decision is identical with that of *Lyons* v. *Oklahoma, supra.* What makes it completely applicable to the instant case is the time factor.

About noon of November 17, 1949, Stroble was arrested for the murder of a six year old girl who had been most brutally killed in connection with a sexual abuse. The arresting officer kicked the defendant and also threatened him with the use of his blackjack. When a nearby civilian asked defendant if he was guilty, he "mumbled something under his breath that sounded like 'I guess I am' ", whereupon he was again slapped and his eye-glasses knocked off.

---

* The confession to Herrschaft furnishes such evidence. If the confession to Captain Meenahan had been coerced and involuntary, petitioner would have availed himself of this opportunity to complain of it to his friend. The strikingly contrary act of, instead, confessing permits us to say with the Court of Appeals (*People* v. *Borowsky*, 258 N. Y. 371); "a jury might reasonably find that he yielded not to fear of violence, but to a conviction that denial of guilt was hopeless when his confederates had turned against him."

On the way to the district attorney's office, defendant admitted the killing in more definite and descriptive terms. To this confession there was no objection at the trial. There was, however, objection to a confession made by defendant to the district attorney about one hour after his arrest and the violence used upon him at that time. The district attorney's interrogation lasted about two hours and during this period defendant had no counsel.

This Court held that the charge of the trial court with respect to confession was proper. We submit that it was not in the least degree different from that of the trial court in the case under consideration. We feel also that the record in *Leyra* is in the important point of "carry over" of coercive effect identical with the record in *Stroble*. The contention is certainly the same:

> "Petitioner does not so much as suggest that the action of any officer during the taking of the confession was accompanied by force or threats. His sole contention is that the incidents in the park foreman's office, coupled with the presence of nineteen officers in the district attorney's office, rendered the confession which he made in the latter office involuntary."

This Court disposed of that contention unfavorably to the petitioner by saying:

> "This Court has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, it must make an independent determination on the undisputed facts. Malinski v. New York, supra (324 U. S. at 494, 89 L. ed. 1032, 65 S. Ct. 781) and cases cited; id., at 438, 89 L. ed. 1050 (dissenting

opinion). We adhere to that rule. In the present case, however, we need not confine ourselves to the undisputed facts; for, even if we give petitioner the benefit of every doubt as to the alleged coercion, we do not think it can fairly be said that his confession in the District Attorney's office was coercion's product. *Whatever occurred in the park foreman's office occurred at least an hour before he began his confession in the District Attorney's office, and was not accompanied by any demand that petitioner implicate himself. Likewise his statement to the officer while on the way to the District Attorney's office was admittedly voluntary.** In the District Attorney's office, petitioner answered questions readily; there was none of the 'pressure of unrelenting interrogation' which this Court condemned in Watts v. Indiana, 338 U. S. 49, 54, 93 L. ed. 1801, 1806, 69 S. Ct. 1347, 1357 (1949). Indeed, the record shows that from the time of his arrest until the time of his trial, petitioner was anxious to confess to anybody who would listen—and as much so after he had consulted with counsel as before. His willingness to confess to the doctors who examined him, after he had been arraigned and counsel had been appointed, and in circumstances free of coercion, suggests strongly that petitioner had concluded, quite independently of any duress by the police, 'that it was wise to make a clean breast of his guilt.' See Lyons v. Oklahoma, supra (322 U. S. at 604, 88 L. ed. 1487, 64 S. Ct. 1208). In the light of all these circumstances, we are unable to say that petitioner's confession in the District Attorney's office was the result of coercion, either physical or psychological." (Italics ours.)

---

* Cf. Confession to Herrschaft and distinction made by Fuld, *J.* between this confession and the Meenahan and District Attorney confessions.

We note in passing that although petitioner does not make a separate point of the claim itself, nevertheless in the body of his petition it is argued that the trial court in *Leyra* did not instruct the jury that the failure to arraign him, as required by the New York statutes, constituted a crime under the provisions of Penal Law, Section 1841. It is conceded that the trial court did charge the jury that such delay of arraignment was illegal. In its charge, the trial court dealt with the effect of delay in arraignment thus:

> "What is the effect of this delay? I charge you that even though illegal, the delay does not in and of itself, as a matter of law, render any confession subsequently made invalid. *Such delay must be considered by you, however, upon, and only upon the question of the voluntary nature of a confession; that is, whether the neglect to properly arraign him affected the voluntariness of the confession. That is submitted as a question of fact for you to determine. If you find that his confession was thereby affected, the confession will be disregarded. On the other hand, if you find the confession was not thereby affected, you will disregard the fact that there was an unnecessary, and, therefore, illegal delay in arraigning the defendant before a Magistrate.*" (Italics ours.)

In *Stroble* v. *California*, when this Court was asked to reverse the conviction on the further ground of illegal delay in arraignment it answered:

> "Although the California Supreme Court found that the failure promptly to arraign petitioner before a committing magistrate was a violation of state law, that is not determinative of the issue before us. When this Court is asked to reverse a state

court conviction as wanting in due process, illegal acts of the state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise. Lisenba v. California, supra (314 U. S. at 234, 235, 240, 86 L. Ed. 179, 182, 62 S. Ct. 280); Lyons v. Oklahoma, supra (322 U. S. at 597, note 2, 88 L. ed. 1483, 64 S. Ct. 1208); Gallegos v. Nebraska, 342 U. S. 55, 59, 65, ante. 86, 91, 94, 72 S. Ct. 141 (1951). Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial."

There remains for consideration petitioner's claim of impropriety under Article V. of the Constitution in that the trial court permitted the prosecutor to read to the jury a portion of petitioner's testimony on the first trial, although he did not take the stand at the second trial. That testimony was his description of the effects of Doctor Helfand's physical manipulations of his body and alleged control of his mind: "I drifted off so I lost consciousness. From that time on I didn't remember anything until Sunday."

This contention, now clothed in the garb of a constitutional right, was termed before the Court of Appeals a violation of Code Crim. Proc. §464 in that it failed to heed the direction of that statute that upon a re-trial "all testimony must be produced anew". It was then also urged that the procedure was a violation of both the state and federal constitutions in that the petitioner was compelled to testify against himself.

The contention is shown to be in error by an examination of the purpose for, and the circumstances under which, the former testimony was introduced. Since the trial court had, in obedience to the direction of the Court of Appeals, told the jury more than once during the progress of the trial that the Helfand incident constituted mental coercion (and was subsequently to charge the jury to the same effect), it became the law of the case, known to the district attorney as well as to appellant's counsel, that the influence of Doctor Helfand's coercive and illegal methods would be presumed to carry over, affect and taint the subsequent confessions (*People* v. *Sweetin,* 325 Ill. 245, 2 Wharton Crim. Ev. 11th Ed., Sec. 601; *Stroble* v. *California, supra*). It is also known to the district attorney that this presumption placed upon him the burden of proving beyond a reasonable doubt that " * * * the influence which induced the original confession had been removed and the party confessing was no longer dominated by such influence" (*People* v. *Sweetin, supra*).

Appellant's testimony at the first trial met this test and furnished the necessary prophylactic evidence. Unless Doctor Bellinger's incredible diagnosis could be accepted as psychiatric verity as a matter of law (and it was rejected by the jury as a question of fact), a person who has "drifted off so I lost consciousness" cannot be, and remain, under the influence of an antecedent mental compulsion. As we have said, the jury within whose province of determination this question lay, found it incredible (*People* v. *Sherwood,* 271 N. Y. 427, 429; *People* v. *Egnor,* 175 N. Y. 419, 424). The Court of Appeals by its affirmance in this case has similarly so determined.

There are, therefore, three answers to petitioner's contention: First, the constitutional prohibition against self-incrimination relates only to testimonial compulsion. It has been so written by Cardozo, *J.*, while a member of the New York Court of Appeals. In *People* v. *Defore* (242 N. Y. 13), he wrote in construing the privilege granted by the New York Constitution, Article 1, Section 6:

> "We limited it to cases where incriminatory disclosure had been extorted by the constraint of legal process directed against a witness. The Supreme Court agreed with us (*Adams* v. *New York,* 192 U. S. 585, 597, 598). Other courts e.g. *State* v. *Flynn,* 35 N. H. 64; *Comm.* v. *Wilkins, supra*) and learned commentaries (4 Wig. Ed. Secs. 2263, 2264) have taken the same ground. Unless that ruling is to be changed, the conclusion is not doubtful."

In refusing to change the ruling, Judge Cardozo quoted with approval from *Hayward* v. *United States* (268 Fed. 795, 802):

> " 'Witness' is the key word",

and then went on to say:

> "The key word is disregarded, however, when compulsion not testimonial is brought within the orbit of the privilege."

Second, the attempt to invoke the Fifth Amendment of the Federal Constitution must fail. In *Adamson* v. *California* (332 U. S. 46, 191 L. Ed. 1903), a state statute was attacked on the ground that it permitted the prosecution and the court to comment upon the failure of a defendant to explain or deny the evidence against him, and further permitted the court and jury to consider that fact in deter-

mining guilt or innocence. This was contended to be a violation of the protection against self-incrimination accorded by the Fifth Amendment and available by reason of national citizenship to a defendant under the protection of the Fourteenth Amendment. The claim was rejected by this Court:

> "We shall assume, but without any intention thereby of ruling upon the issue, that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant 'to explain or to deny by his testimony any evidence or facts in the case against him' would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights." *

---

* We will not burden this Court with further quotations from its own decisions. Suffice it to say that in *Adamson* v. *California*, p. 52, there is found a history of the doctrine summarized in the above quotation, citing all of the cases in this Court and concluding: "We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship." The last word on the subject has been written by this Court in *Brock* v. *North Carolina*, 97 L. Ed. (advance, p.).

If more were necessary on this subject, it would be sufficient to cite *United States* v. *Heller* (57 Fed. 2nd 627; cert. denied 286 U. S. 567) in which it was said:

> "Having voluntarily become a witness upon one issue in the case, what he there testified may thereafter be shown against him upon any trial of any other issue therein. This was held in principle, but upon somewhat different facts, in *Raffele* v. *U. S.*, 271 U. S. 494, 46 S. Ct. 566, 70 L. ed. 1054 and *Powers* v. *U. S.*, 223 U. S. 303, 32 S. Ct. 281, 56 L. ed. 448; and upon like facts in *Vaught* v. *U. S.*, 7 F. (2d) 370 (CCA 9), and U. S. v. Lindsly, 7 F. (2d) 247 (DCLA). We find in this no invasion of appellant's constitutional immunity against compulsory self-incrimination." *

We conclude with a reference to certain exhibits labeled in the petition appendices "E" and "F" which are quotations from articles on hypnotism by scientists and a quotation from an alleged story of mental coercion in Soviet Russia. It is submitted that such material finds no proper place in the petition to this Court. It was not before the

---

* The current of authority in this country is the same where he testified at the second trial (*Warde* v. *United States*, 158 Fed. 2d 651; *Indian Fred* v. *State*, 36 Arizona, 48; *People* v. *Boyd*, 67 Calif. Appeals 292; *State* v. *Duffy*, 57 Conn. 525; *Cadys* v. *State*, 198 Ga. 99; *Miller* v. *People*, 216 Ill. 309; *State* v. *Rogers*, 56 Kan. 362; *Bess* v. *Com.*, 118 Ky. 858; *Henze* v. *State*, 154 Md. 332; *Com.* v. *Reynolds*, 122 Mass. 454; *State* v. *Newman*, 127 Minn. 445; *Mackmasters* v. *State*, 83 Miss. 1; *State* v. *Speyer*, 207 Mo. 540; *State* v. *Wright*, 38 N. M. 427; *State* v. *Farrell*, 223 NC 804; *Com.* v. *Brown*, 66 Pa. Super. 519; *Rafferty* v. *State*, 91 Tenn. 655; *Rodriguez* v. *State*, 130 Tex. Crim. 438; *State* v. *Tellay*, 100 Utah 25; *Fertig* v. *State*, 100 Wis. 301). It is equally the law where the defendant does not take the stand at the second trial (*Heller* v. *United States*, 57 F. 2d 627; *State* v. *Kimes*, 152 Iowa 240; *State* v. *King*, 102 Kan. 155; *State* v. *McPherson*, 77 Or. 151; *Scherpig* v. *State*, 112 Tex. Crim. 61).

jury in the court below and indeed under the law could not have been submitted to them (*People* v. *Feldman*, 299 N. Y. 153, 168). What counsel could not have done on the trial they should not now be permitted to do. We are confident that this Court will give no consideration to these unauthorized exhibits.

IN CONCLUSION

We respectfully submit:

Petitioner was accorded a fair trial. The three confessions to Captain Meenahan, Herrschaft and the district attorney were freely and voluntarily made without influence in the making thereof by carry-over of the Helfand "mental coercion" or promise of immunity. The issue of voluntary or involuntary confessions was properly submitted to the jury under instructions which met every requirement of law. No error was committed in the reception of evidence either *per ore* or by the reading of petitioner's testimony on the first trial.

II.

The petition should be denied.

Dated, Brooklyn, N. Y., February, 1953.

Respectfully submitted,

MILES F. McDONALD,
District Attorney,
Kings County, New York.

WILLIAM I. SIEGEL,
Assistant District Attorney,
Of Counsel.

(4544)

APPENDIX

Section 395, Code of Criminal Procedure:

"§395. Confession of defendant, when evidence, and its effect

A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Article 1, Section 6 of the New York State Constitution:

"§6. (Grand jury; protection of certain enumerated rights; waiver of immunity by public officers required.)

* * * * *

No person shall be deprived of life, liberty or property without due process of law."

Office - Supreme Court, U.S.
FILED
MAR 30 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term 1952

No. 331 MISC.

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR REHEARING OF APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HARRY G. ANDERSON,
FREDERICK W. SCHOLEM,
Counsel for Petitioner.

INDEX

PAGE

Reasons Why a Rehearing Should Be Granted and a Writ of Certiorari Issued 2

CASES CITED

Stein, Cooper and Wissner v. State of New York, October Term, 1952 2

Supreme Court of the United States

October Term 1952

No.

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR REHEARING OF APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Comes now, Camilo Weston Leyra, and respectfully petitions this Honorable Court for a reconsideration of his petition for a writ of certiorari to review the judgment of the County Court of the County of Kings, State of New York, as affirmed by the Court of Appeals of the State of New York, whereby your petitioner was adjudged guilty of murder in the first degree, and sentenced to death.

The petition was submitted under Number 331 Misc. of the October Term, 1952 and was denied by order filed March 16th, 1953. Mr. Justice Black and Mr. Justice Douglas, however, are of the opinion that the petition should be granted. The stay of execution, theretofore, granted by

Mr. Justice Charles W. Froessel, Associate Judge of the Court of Appeals of the State of New York, expires and a motion is now pending before the Court of Appeals of the State of New York to set a new date of execution. Petitioner is confined at Sing Sing State Prison, Ossining, New York.

This petition for rehearing is made, pursuant to the provisions of Rule 33 of the Rules of this Court.

Reasons Why a Rehearing Should Be Granted and a Writ of Certiorari Issued

Several cases now pending before this Court in which petitions for certiorari were granted, present questions of law similar to those presented in the instant case. (See *Stein, Cooper and Wissner* v. *State of New York,* October Term, 1952.)

Counsel for petitioner are not unmindful that full consideration was given to the petition. Yet they are so convinced that there was a denial of due process in this case, that they believe the failure so to demonstrate was due to fault on their part. In an effort to present a comprehensive review of the proceedings below, the very volume of the matters discussed may have obscured the fundamental problems sought to be presented.

Counsel recognize that while this Court is reluctant to review the administration of justice in the several States, it has repeatedly acted when it believed that fundamental due process has been denied. In this case, the belief that this has occurred arises from no single incident.

This is an unparalleled case in the annals of American jurisprudence.

If this Court can be convinced:

A. That a District Attorney hired a psychiatrist to mentally coerce the petitioner; that the prosecutor listened to the technique and mental coercion while it was being practiced on petitioner without intervention.

B. That a promise was made not to prosecute petitioner for murder in the first degree if he confessed.

C. That the psychiatrist threatened to give the petitioner an "injection" to make him talk; that the psychiatrist represented himself to be petitioner's doctor sent to cure his sinus condition. "If a physician may thus be used, then why not a lawyer or clergyman?" (Froessel J, in People v. Leyra 302 N. Y. 353, 363.)

D. That petitioner was continuously interrogated for four days without arraignment.

E. That the coerced confession, barred by the Court of Appeals in its unanimous reversal of this first conviction, was admitted into evidence at the second trial.

F. That petitioner was compelled to be a witness against himself.

would it then say that what occurred at this trial was not serious enough to warrant its intervention?

The New York Court of Appeals unanimously reversed the first conviction of the petitioner. The evidence in the second trial was substantially the same as in the first except that petitioner did not testify. The Court below affirmed the second conviction, but Chief Judge Loughran and Mr. Justice Fuld dissented. Is such a case so free from doubt that this Court will not hear argument on the merits?

I.

The case presents directly the question whether, mental coercion can be substituted in place of physical coercion for the purpose of obtaining confessions.

We submit this is a matter meriting review by this Court.

Indeed the evil of mental coercion is greater than physical violence for it leaves no tell-tale marks. Men can, if strong, withstand physical violence, yet no human mind can withstand continued mental coercion, not even great spiritual leaders.

II.

The Court of Appeals in unanimously reversing the first conviction 302 N. Y. 353 stated at page 364:

> "The transcript of the recording clearly discloses that the interview took place in an atmosphere of the utmost pressure, and in a manner and with a skill possible only to an experienced psychiatrist, unfamiliar with an accused's fundamental rights. As the prosecutor said of this psychiatrist in his summation: 'with his superior mental powers, his studies of psychology, he was able to accomplish what a brow-beating policeman might not have been able to obtain.' This was an eloquent tribute to the efficacy of mental coercion over physical."
>
> "Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. A confession by which a person forfeits his life must be grounded on reasoned and voluntary choice. We would have to close our minds to the plain import of what occurred to deny that here was a deliberate attempt to extract a confession through the cease-

less pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation of the exhausted accused. Aside from constitutional objections, we have not yet reached the stage where medical science, represented by an accord among its experts, establishes the trustworthiness of a confession induced by the means here adopted. See 3 Wigmore on Evidence (3d ed.), Sec. 841a; People v. Forte, 279 N. Y. 204, 206, 18 N. E. 2d 31, 32, 119 A. L. R. 1198. Due process of law guaranteed by our State and Federal Constitutions commands that no such practice as revealed by this record shall send an accused to his doom, regardless of the brutality of the crimes with which he is charged."

When the Court of Appeals affirmed the second conviction, the dissenting Judges in the Court of Appeals stated:

"To see this case whole and in proper focus, it must be borne in mind that defendant's conviction rests solely upon his confessions and that the trial court so charged the jury, advising that, absent those confessions, 'defendant must be acquitted for the reason that the Court rules, as a matter of law, that all other evidence in the case * * * even if accepted by the jury as true, is insufficient upon which to predicate a verdict of guilty'" (see trial court's charge, fol. 2687).

"The trial judge charged unequivocally that Dr. Helfand had promised defendant, 'in order to induce him to confess,' that he would not be prosecuted for murder in the first degree, that such promise was authorized by the District Attorney and that defen-

> dant confessed in reliance upon it. Consequently, as the trial court went on to charge, that confession was inadmissible as a matter of law. (See Code Crim. Pro., Sec. 395.) In view of that charge—which, of course, became the law of the case—it necessarily follows, as a matter of ineluctable logic, that any and all other confessions to the District Attorney or those associated with him in the investigation and prosecution of this very homicide, must also be deemed to have been induced by that promise, and likewise inadmissible. Accordingly, when the court further instructed the jury that it might find that the confessions to assistants of the District Attorney and to a police captain—made within an hour or two after immunity had been promised—had not been induced by the promise, it pursued a course that was not only opposed to logic, but incompatible with the law of the case. That was error highly prejudicial to defendant.''

Counsel appreciate that this Court may be hesitant to review a case, where a petitioner has had two trials, and which received careful consideration by the New York Court of Appeals. But the very divergences of opinions of the Judges of that Court shows that there are very serious questions involved. When dissenting Judges of such distinction feel that the conviction should be reversed, the case surely is one which involves such fundamental principles as to warrant its review by this Court.

There is here, certainly, no doubt that mental coercion was exercised upon the petitioner; there certainly is grave doubt as to whether all confessions which were obtained within a period of four or five hours on the same night and without interruption were not infected by the virus of

coercion and were not induced by the promise not to prosecute if petitioner confessed. We submit that no judgment, especially of death, ever should go unreviewed in this Court where there is this grave doubt.

Counsel certify that this petition is presented in good faith and the sincere belief that it has merit, and not for the purpose of delay, and that there are intervening circumstances of substantial effect.

Wherefore, your petitioner, by counsel whose signatures are subscribed, pray that their petition for writ of certiorari may be reconsidered.

CAMILO WESTON LEYRA

By: HARRY G. ANDERSON

FREDERICK W. SCHOLEM

Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

We hereby certify that we have examined the foregoing petition for rehearing and that it is restricted to the grounds specified therein and that in our opinion it is well founded and the cause is one in which the petition should be granted.

HARRY G. ANDERSON
Counsel for Petitioner

FREDERICK W. SCHOLEM
Counsel for Petitioner

Sworn to before me this
27th day of March, 1953.

FREDA GINDER
Notary Public, State of New York
No. 31-6525050
Qualified in New York County
Certificates filed with:
Bronx, Kings County Clerks
New York, Bronx, Kings Register's Offices
Term expires March 30, 1954

Office - Supreme Court, U.S.
FILED
APR 10 1953
HAROLD B. WILLEY, Clerk

NO. 331 MISC.

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

AFFIDAVIT IN OPPOSITION TO PETITION FOR RE-HEARING OF APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MILES F. McDONALD,
District Attorney,
Kings County,
New York.

WILLIAM I. SIEGEL,
Assistant District Attorney,
of Counsel.

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

IN THE

Supreme Court of the United States

October Term 1952

CAMILO WESTON LEYRA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

AFFIDAVIT IN OPPOSITION TO PETITION FOR RE-HEARING OF APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

WILLIAM I. SIEGEL, being duly sworn, deposes and says:

I am an Assistant District Attorney on the staff of the District Attorney of Kings County. I am familiar with all the proceedings herein, having had charge thereof at all stages in the Court of Appeals of the State of New York and in this Court.

This affidavit is made in opposition to a petition for a re-hearing of an application for a writ of certiorari to the Court of Appeals of the State of New York. That Court affirmed a judgment of the County Court of Kings County which convicted petitioner of the crime of Murder in the First Degree for the killing of his father, Camilo Weston Leyra, Sr. A petition for a writ of certiorari to

the Court of Appeals was denied by an order filed March 16, 1953. The instant petition for a re-hearing follows.

I have carefully read the petition and respectfully submit to the Court that it makes no showing of any question of law or matter of fact which the Court overlooked in its decision denying the original petition. In essence, petitioner does no more than repeat, in abbreviated form, the contentions made in his original petition. Our submission is that repetition adds no merit to the meritless content of the arguments already made to, and rejected by, this Court.

Petitioner refers to the case of *Cooper, Stein and Wissner* v. *New York*, with a statement that petitions for certiorari have been granted by this Court following affirmance of judgments of conviction for Murder in the First Degree (303 N. Y. 856, 982). It is claimed that there is similarity between that and the instant case. The claim is unfounded.

The Court of Appeals affirmed without opinion. On a motion to amend the Remittitur, however, the Court certified to this Court that there were present in the case and necessarily passed upon by the Court of Appeals the following questions:

(1) Whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution of the United States;

(2) Whether the admission in evidence of the confession and the prior and subsequent oral statements of the defendant Stein violated his rights under the Fourteenth Amendment of the Constitution of the United States;

(3) Whether the admission in evidence of the confessions of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States;

(4) Whether the refusal to sever the trial of the defendant Wissner from that of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States;

(5) Whether the refusal of the Trial Judge to delete from the confessions of defendants Cooper and Stein all references therein made to the defendant Wissner as a participant in the crime violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied.

This Court, in granting certiorari, limited its review to the admissibility of the various confessions.

With this in mind we have had recourse to the record on appeal and the briefs in the Court of Appeals. Examination of these documents discloses that defendants Cooper and Stein both contended that they had been subjected to extreme physical violence and brutality.

Cooper, it was claimed, was kept for hours handcuffed, part of the time sitting on a chair and part of the time sleeping in that fashion on a bare bed. He was beaten

to the point where a medical examination by the County Medical Examiner disclosed that "there were bruises on the left posterior lateral chest, abdomen, right bicep and both buttocks".

Defendant Stein claimed similarly to have been beaten, with the result that "there were bruises and black and blue marks on both arms. The left arm, area of discoloration and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 by 4 inches."

Wissner's contention is that in view of the existence of the confessions by his co-defendants, it was prejudicial error to the point of unconstitutionality not to have granted him a separate trial.

In an uninterrupted line of cases, this Court has taken jurisdiction to determine independently *the question of fact* presented by claims of physical violence in the sequence of events preceding a confession. The Court considers such a course obligatory upon it under the Fourteenth Amendment to the Federal Constitution. We see in the granting of the petition for certiorari to Cooper, Stein and Wissner no more,—and, of course, no less,—than an adherence to this principle of constitutional interpretation. In the *Leyra* case, there is no such issue of fact. First (although, we concede, not in itself a determinative difference), the coercion was mental. Secondly, and most importantly, that coercion was never disputed by the People on the trial. The practices of Dr. Helfand upon

petitioner were stigmatized by the Trial Court as such mental coercion and the confession made to the doctor was characterized by the Trial Court for this reason as "worthless as evidence of guilt". The jury were so instructed.

Moreover, the mental coercion became the touchstone whereby all subsequent confessions were tested and judged by the jury. Their finding that the subsequent confessions were nevertheless voluntary is, therefore, a determination, not of physical fact, but of mental state of mind on the part of petitioner when he subsequently confessed.

Petitioner now asks this Court to find as a matter of law contrary to what the jury found as a matter of fact,—and that, be it noted, not in the realm of obvious and demonstrable physical fact but in the debatable field of mental attitude. In effect, petitioner asks this Court to become judge and jury and *psychiatric expert* all in one.

This Court has never heretofore assumed such multiple roll and we are confident that nothing in its constitutional duty compels, or even permits, it so to act.

It is, therefore, respectfully prayed that the petition for a re-hearing should be in all respects denied.

William I. Siegel

Sworn to before me this
2nd day of April, 1953.

David Diamond
Notary Public
March 30, 1954